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CIRCUIT REALIGNMENT

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON
IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 2988, S. 2989, and S. 2990

THE REALIGNMENT OF THE FIFTH AND NINTH CIRCUIT
COURTS OF APPEALS

PART 1

SEPTEMBER 24, 25, 26; OCTOBER 1, 2, AND 3, 1974

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(II)



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CIRCUIT REALIGNMENT

TUESDAY, SEPTEMBER 24, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick and Hruska.

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel; Kathryn Coulter, chief clerk.

Senator BURDICK. Today the subcommittee commences the third—and what is hoped will be the last—phase of hearings concerning the U.S. courts of appeals for several circuits.

In the 92d Congress the subcommittee was instrumental in the enactment of Public Law 92-489 which created the Commission on Revision of the Federal Court Appellate System. Pursuant to this law, that Commission, chaired by the senior Senator from Nebraska—and upon which the senior Senators from Arkansas, Florida, and I are privileged to serve—made its initial report on December 18, 1973, in which it recommended geographical realignment of the fifth and ninth judicial circuits. Thereafter, on behalf of the Senators serving on that Commission, I introduced S. 2988, S. 2989, and S. 2990. Those three bills embody the principal and alternative recommendations of that Commission with reference to dividing the fifth and ninth circuits. In March and April of this year, the subcommittee conducted a series of hearings on S. 2991 in order to investigate the needs of the several circuits other than the fifth and ninth for additional judgeships.

We are now commencing the final phase of these circuit hearings. At the conclusion of this opening statement, I will incorporate in the record the more comprehensive statement which I made when this series of bills to which I have referred was introduced on February 7, 1974. Without repeating what I then said, let me simply observe that in the interval since introduction of these bills, fiscal year 1974 has now been completed, and the preliminary judicial statistics available from that year indicate that the total appeals filed in the 11 courts of appeals has increased from 15,629 in the preceding year to 16,436 in 1974. This is an increase of more than 800 cases, and while the cases terminated by these courts increased approximately 300 cases, this meant that all of the circuits combined fell another 500 cases behind.

As presently constituted, the fifth and ninth circuits, with an expanding caseload, have encountered difficult problems, and each of

those circuits has been forced to resort to various expediciencies to cope with the increased workload. The fifth circuit has adopted a practice of screening cases which has resulted in almost 60 percent of all the cases being decided without according to the parties the right of oral argument. During the hearings held by the Commission in the principal cities within the fifth circuit, members of the trial bar raised strenuous objections to this denial of oral argument in the fifth circuit.

In the ninth circuit expediency has taken a different approach. In that circuit, in order to avoid delays in the disposition of civil cases, which in many instances have run 2 years or more, the court has adopted the practice of assigning a district court judge as one member of the three-judge panels which hear and determine cases of that circuit. In the hearings held by the Commission on the west coast, many members of the trial bar objected to the frequency with which the cases were being considered by panels, not of circuit judges, but by panels including one or more district judges.

The Commission in its December report stated its belief that the problems presently existing in the fifth and ninth circuits are of such a dimension that some realignment of those two circuits is required in order to afford a measure of relief to litigants in those circuits without the necessity of resorting to unpopular expediciencies as a means of coping with an excessive and ever-growing caseload.

For several years the fifth circuit has had 15 authorized judgeships and the ninth circuit has had 13 authorized judgeships. No other circuit has more than nine judges. Despite this large number of judges each of these circuits has had difficulty in handling its caseload. In the most recent year, the appeals filed in the fifth circuit increased by 330 cases and those in the ninth circuit by 381 cases. This increase in just the past fiscal year indicates that, at a minimum, at least two additional judgeships would be required in each of these circuits just to handle the increase.

During the course of these hearings the subcommittee will be examining the advantages and disadvantages of each of the principal recommendations and of each alternative made by the Commission, as well as the advantages and disadvantages of any alternative solutions which may be suggested by any of the interested parties.

It is not my expectation that the subcommittee will find unanimous support for any one proposal. On the contrary, it is more likely that the subcommittee will be searching for that alternative which appears to offer the greatest hope for a real and substantial improvement over the real and existing conditions and which results in little relative inconvenience to the fewest number of persons. As always, the important question is whether the interests of justice are served by a particular structure, composition or procedure which is now employed or which can be employed in the resolution of the judicial business of these courts.

At this time there will be inserted in the record copies of the introductory statement of February 7, 1974, S. 2988, S. 2989, and S. 2990, a copy of the report of the Commission entitled, "The Geographical Boundaries of the Several Circuits; Recommendations for Change," dated December 1973, and copies of committee exhibits A-2, B-2, C-2, D-2, E-5, E-12, and F, which contain statistical data relating to the fifth circuit court of appeals.

[The materials follow:]

[From the Congressional Record, Feb. 7, 1974]

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. BURDICK (for himself, Mr. Gurney, Mr. Hruska, and Mr. McClellan) (by request) :

S. 2988. A bill to improve judicial machinery by designating Alabama, Florida, and Georgia as the 5th judicial circuit; by designating Louisiana, Mississippi, Texas, and the Canal Zone as the 11th judicial circuit; by dividing the 9th judicial circuit and creating a 12th judicial circuit, and for other purposes;

S. 2989. A bill to improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi as the 5th judicial circuit; by designating Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota as the 8th judicial circuit; by designating Arkansas, Louisiana, Texas, and the Canal Zone as the 11th judicial circuit; by dividing the 9th judicial circuit and creating a 12th judicial circuit, and for other purposes;

S. 2990. A bill to improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi as the 5th judicial circuit; by designating Louisiana, Texas, and the Canal Zone as the 11th judicial circuit; by dividing the 9th judicial circuit and creating a 12th judicial circuit, and for other purposes; and

S. 2991. A bill to authorize additional judgeships for the U.S. Courts of Appeals. Referred to the Committee on the Judiciary.

Mr. BURDICK. Mr. President, I am introducing, for appropriate reference, four bills, the consideration of which will permit the Congress to make a start on solving some of the most immediate problems of the U.S. courts of appeals.

In 1963, the courts of appeals for the 11 circuits in the Federal system were called upon to handle 5,400 cases with a complement of 69 authorized judgeships or an average of 78 cases per judge. Ten years later, in 1973, the number of appeals filed had soared to 15,629 which, with 97 authorized judgeships, resulted in an average 161 per judge. Thus, while judgeships increased by a little less than 50 percent, the cases filed increased by 300 percent. In 1971, the Judicial Conference of the United States recommended that the Congress authorize 11 additional circuit court judgeships in most but not all of the 11 circuits. In recognition of the fact that the caseload problems of our Federal courts are not amenable to solution solely by the increase in the number of judges, the 92d Congress responded by creating a Commission on Revision of the Federal Court Appellate System—Public Law 92-489. On December 18, 1973, this Commission, which was chaired by the senior Senator from Nebraska, and upon which the senior Senators from Arkansas, Florida and I were privileged to serve, filed its initial report in which it recognized that the appellate problems were particularly acute in the fifth and ninth judicial circuits. The Commission further recommended that immediate relief could be afforded to litigants in those circuits only by dividing each of those circuits into two new circuits. While the Commission is continuing the second phase of its studies in which it will study the structure and internal operating procedures of the courts of appeals, its further recommendation in this area will not obviate the necessity for realigning the States presently included in the fifth and ninth circuits in each of which the volume of litigation has far outstripped the capacity of the 28 judges currently assigned to those circuits.

Three of the bills which I am introducing today by request and on behalf of myself and my colleagues from Arkansas, Florida, and Nebraska, S. 2988, S. 2989, and S. 2990 are bills which would implement the alternative recommendations of the Commission on Revision of the Federal Court Appellate System. Each of these three bills would split the existing 5th circuit into two new circuits to be designated as the 5th and 11th circuits. Under one bill the new fifth circuit would consist of the States of Alabama, Florida, and Georgia. The new 11th circuit would consist of Louisiana, Mississippi, and Texas and would also include jurisdiction over appeals emanating from the District Court of the District of the Canal Zone.

The second bill incorporates the Commission's first alternative recommendation under which the new 5th circuit would consist of Florida, Georgia, Alabama, and Mississippi, and the 11th circuit would consist of Texas, Louisiana, Arkansas and the Canal Zone.

The third bill incorporates the second alternative recommendation of the Commission, under which the 5th circuit would consist of Florida, Georgia, Alabama, and Mississippi; and the new 11th circuit would consist of Texas, Louisiana, and the Canal Zone.

It will be perceived that the first two bills present alternatives under which at least three States would be included in each circuit, a factor deemed important by several authorities. The third alternative would provide for only two States in

one of the circuits. Obviously the Congress must make a choice between these alternatives.

All three of the bills would divide the existing 9th circuit by creating a new 12th circuit comprised of Arizona, the central and southern judicial districts of California and Nevada. A new 9th circuit comprising the balance of the present ninth circuit would consist of the eastern and northern judicial districts of California and the States of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, and the District Court of the District of Guam. Since a simple division of the States comprising the present circuits would accomplish nothing, unless the judge power is also increased, these bills also contemplate creation of new judgeships within the new circuits sufficient to handle the workload which is being allocated to four circuits instead of the present two. The exact number of new circuit judgeships will be considered during the hearings and will require amendment of section 5 of these bills.

Because the State of California comprises 10 percent of the national population and because the State of California alone generates two-thirds of the judicial business of the present ninth circuit, the Commission concluded that the only feasible realignment of States within the ninth circuit must include a division of the four judicial districts in California between the two new circuits in the west. If the Commission's recommendation is accepted by the Congress, a possibility would exist that the two new circuits would reach conflicting results regarding the constitutionality of a California statute or an order of a California administrative agency having statewide application. A conflict of this nature must be resolved and the bills which I am introducing would require in section 7 of each bill, that such a conflict to be resolved by the Supreme Court of the United States.

As presently constituted, the fifth and ninth circuits, with an expanding caseload, have encountered difficult problems and each of those circuits have been forced to resort to various expediciencies to cope with the increased workload. The fifth circuit has adopted a practice of screening cases which has resulted in almost 60 percent of all the cases being decided without according to the parties the right of oral arguments. During the hearings held by the Commission in the principal cities within the fifth circuit, members of the trial bar raised strenuous objections to this denial of oral argument in the fifth circuit.

In the ninth circuit expediency has taken a different approach. In that circuit, in order to avoid delays in the disposition of civil cases, which in many instances have run 2 years or more, the court has adopted the practice of assigning a district court judge as one member of the three-judge panels which hear and determine cases of that circuit. In the hearings held by the Commission on the west coast, many members of the trial bar objected to the frequency with which the cases were being considered by panels not of circuit judges but of a panel including one or more district judges.

The sponsors of these bills believe that the problems presently existing in the fifth and ninth circuits are of such a dimension that some realignment of the States in those circuits is required in order to eliminate the resort to unpopular expediciencies as a means of coping with an excessive caseload. These bills will serve as vehicles to lay these problems before the appropriate committee for thorough study in the hearing process.

The fourth bill which I am introducing today (S. 2991) is a so-called omnibus circuit court judgeship bill which incorporates the recommendation of the Judicial Conference of the United States that the Congress create nine additional circuit judgeships as follows:

First Circuit: one judgeship.
 Second Circuit: two judgeships.
 Third Circuit: one judgeship.
 Fourth Circuit: one judgeship.
 Seventh Circuit: one judgeship.
 Tenth Circuit: one judgeship.

As I previously stated the additional judgeships needed by the existing fifth and ninth circuits will be considered in connection with the bill realigning those circuits.

The increased case filings in the courts of appeals which has occurred since 1968, when an increase was last approved in the number of authorized circuit judgeships, requires that the Congress investigate the need for additional judges. In the hearings to be held on these four bills I propose that the need for additional judges be weighed in the light of the workload which the current level of case filings imposes upon the judges of our appellate courts in the 11 circuits. I hope that such hearings can be scheduled this spring.

Mr. President, I ask unanimous consent that all four bills be printed in the Record following these explanatory remarks.

There being no objection, the bills were ordered to be printed in the Record.

93^d CONGRESS
2^d SESSION

S. 2988

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1974

Mr. BURDICK (for himself, Mr. GURNEY, Mr. HRUSKA, and Mr. McCLELLAN)
(by request) introduced the following bill; which was read twice and
referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by designating Alabama, Florida, and Georgia as the fifth judicial circuit; by designating Louisiana, Mississippi, Texas, and the Canal Zone as the eleventh judicial circuit; by dividing the ninth judicial circuit and creating a twelfth judicial circuit, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 41 of title 28 of the United States Code is
4 amended to read in part as follows:

5 “The thirteen judicial circuits of the United States are
6 constituted as follows:

"Circuits				Composition		
*	*	*	*	*	*	*
"Fifth-----				Alabama, Florida, Georgia.		
*	*	*	*	*	*	*
"Ninth-----				Alaska, Eastern and Northern Judicial District of California, Hawaii, Idaho, Montana, Oregon, Washington, Guam.		
*	*	*	*	*	*	*
"Eleventh ---				Louisiana, Mississippi, Texas, Canal Zone.		
"Twelfth ---				Arizona, Central and Southern Judicial Districts of California, Nevada."		

1 SEC. 2. Any circuit judge of the fifth circuit as con-
2 stituted the day prior to the effective date of this Act, whose
3 official station is within the fifth circuit as constituted by this
4 Act, is assigned as a circuit judge to such part of the former
5 fifth circuit as is constituted by this Act the fifth circuit, and
6 shall be a circuit judge thereof; and any circuit judge of the
7 fifth circuit as constituted the day prior to the effective date
8 of this Act, whose official station is within the eleventh circuit
9 as constituted by this Act, is assigned as a circuit judge of
10 such part of the former fifth circuit as is constituted by this
11 Act the eleventh circuit, and shall be a circuit judge thereof.

12 SEC. 3. Any circuit judge of the ninth circuit as con-
13 stituted the day prior to the effective date of this Act, whose
14 official station is within the ninth circuit as constituted by this
15 Act, is assigned as a circuit judge to such part of the former
16 ninth circuit as is constituted by this Act the ninth circuit,
17 and shall be a circuit judge thereof; and any circuit judge of
18 the ninth circuit as constituted the day prior to the effective
19 date of this Act, whose official station is within the twelfth

1 circuit as constituted by this Act, is assigned as a circuit judge
2 of such part of the former ninth circuit as is constituted by
3 this Act the twelfth circuit, and shall be a circuit judge
4 thereof.

5 SEC. 4. Where on the day prior to the effective date of
6 this Act any appeal or other proceeding has been filed with
7 the circuit court of appeals for either the fifth or the ninth
8 circuit as constituted before the effective date of this Act—

9 (1) If any hearing before said court has been held in the
10 case, or if the case has been submitted for decision, then
11 further proceedings in respect of the case shall be had in the
12 same manner and with the same effect as if this Act had
13 not been enacted.

14 (2) If no hearing before said court has been held in
15 the case, and the case has not been submitted for decision,
16 then the appeal, or other proceeding, together with the orig-
17 inal papers, printed records, and record entries duly certi-
18 fied, shall, by appropriate orders duly entered of record, be
19 transferred to the circuit court of appeals to which it would
20 had gone had this Act been in full force and effect at the
21 time such appeal was taken or other proceeding commenced,
22 and further proceedings in respect of the case shall be had
23 in the same manner and with the same effect as if the
24 appeal or other proceeding had been filed in said court.

1 SEC. 5. The President shall appoint, by and with the
 2 consent of the Senate, such additional circuit judges for the
 3 fifth, ninth, eleventh, and twelfth circuits as the Congress
 4 may authorize by this Act.

5 SEC. 6. Section 48 of title 28 of the United States Code
 6 is amended to read in part as follows:

7 “§ 48. **Terms of court**

8 “Terms or sessions of courts of appeals shall be held
 9 annually at the places listed below, and at such other places
 10 within the respective circuits as may be designated by rule
 11 of court. Each court of appeals may hold special terms at
 12 any place within its circuit.

Circuits			Places			
*	*	*	*	*	*	*
“Fifth_____			Atlanta and Jacksonville.			
*	*	*	*	*	*	*
“Ninth_____			San Francisco, Portland, and Seattle.			
*	*	*	*	*	*	*
“Eleventh_____			New Orleans and Houston.			
*	*	*	*	*	*	*
“Twelfth_____			Los Angeles.”			

13 SEC. 7. Section 1254 of title 28 of the United States
 14 Code is amended by adding a new subsection (4) reading
 15 as follows:

16 “(4) By appeal, where is drawn in question, the validity
 17 of a State statute or of an administrative order of statewide
 18 application on the ground of its being repugnant to the
 19 Constitution, treaties, or laws of the United States: *Provided,*
 20 *however,* That this subsection shall apply only when the

1 court of appeals certifies that its decision is in conflict with
2 the decision of another court of appeals with respect to the
3 validity of the same statute or administrative order under
4 the Constitution, treaties, or laws of the United States.”

5 Sec. 8. This Act shall take effect on July 1, 1975.

93^d CONGRESS
2^d SESSION

S. 2989

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1974

Mr. BURDICK (for himself, Mr. GURNEY, Mr. HRUSKA, and Mr. McCLELLAN)
(by request) introduced the following bill; which was read twice and
referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi as the fifth judicial circuit; by designating Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota as the eighth judicial circuit; by designating Arkansas, Louisiana, Texas, and the Canal Zone as the eleventh judicial circuit; by dividing the ninth judicial circuit and creating a twelfth judicial circuit, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 41 of title 28 of the United States Code is
4 amended to read in part as follows:

II

1 “The thirteen judicial circuits of the United States are
2 constituted as follows:

Circuits	Composition
* * *	* * * *
“Fifth-----	Alabama, Florida, Georgia, Missis- sippi.
* * *	* * * *
“Eighth-----	Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
* * *	* * * *
“Ninth-----	Alaska, Eastern and Northern Judi- cial Districts of California, Hawaii, Idaho, Montana, Oregon, Washing- ton, Guam.
* * *	* * * *
“Eleventh-----	Arkansas, Louisiana, Texas, Canal Zone.
* * *	* * * *
“Twelfth-----	Arizona, Central and Southern Ju- dicial Districts of California, Nevada.”

3 SEC. 2. Any circuit judge of the fifth circuit as con-
4 stituted the day prior to the effective date of this Act, whose
5 official station is within the fifth circuit as constituted by
6 this Act, is assigned as a circuit judge to such part of the
7 former fifth circuit as is constituted by this Act the fifth
8 circuit, and shall be a circuit judge thereof; and any circuit
9 judge of the fifth circuit as constituted the day prior to the
10 effective date of this Act, whose official station is within the
11 eleventh circuit as constituted by this Act, is assigned as a
12 circuit judge of such part of the former fifth circuit as is
13 constituted by this Act the eleventh circuit, and shall be a
14 circuit judge thereof.

3

1 SEC. 3. Any circuit judge of the ninth circuit as con-
2 stituted the day prior to the effective date of this Act, whose
3 official station is within the ninth circuit as constituted by this
4 Act, is assigned as a circuit judge to such part of the former
5 ninth circuit as is constituted by this Act the ninth circuit,
6 and shall be a circuit judge thereof; and any circuit judge
7 of the ninth circuit as constituted the day prior to the effective
8 date of this Act, whose official station is within the twelfth
9 circuit as constituted by this Act, is assigned as a circuit judge
10 of such part of the former ninth circuit as is constituted by
11 this Act the twelfth circuit, and shall be a circuit judge
12 thereof.

13 SEC. 4. Where on the day prior to the effective date of
14 this Act any appeal or other proceeding has been filed with
15 the circuit court of appeals for either the fifth or the ninth
16 circuit as constituted before the effective date of this Act—

17 (1) If any hearing before said court has been held in
18 the case, or if the case has been submitted for decision, then
19 further proceedings in respect of the case shall be had in
20 the same manner and with the same effect as if this Act had
21 not been enacted.

1 (2) If no hearing before said court has been held in the
2 case, and the case has not been submitted for decision, then
3 the appeal, or other proceeding, together with the original
4 papers, printed records, and record entries duly certified,
5 shall, by appropriate orders duly entered of record, be trans-
6 ferred to the circuit court of appeals to which it would have
7 gone had this Act been in full force and effect at the time
8 such appeal was taken or other proceeding commenced, and
9 further proceedings in respect of the case shall be had in the
10 same manner and with the same effect as if the appeal
11 or other proceeding had been filed in said court.

12 SEC. 5. The President shall appoint, by and with the
13 consent of the Senate, such additional circuit judges for the
14 fifth, ninth, eleventh, and twelfth circuits as the Congress
15 may authorize by this Act.

16 SEC. 6. Section 48 of title 28 of the United States Code
17 is amended to read in part as follows:

18 **“§ 48. Terms of court**

19 “Terms or sessions of courts of appeals shall be held
20 annually at the places listed below, and at such other places
21 within the respective circuits as may be designated by rule
22 of court. Each court of appeals may hold special terms at any
23 place within its circuit.

"Circuits			Places			
*	*	*	*	*	*	*
"Fifth-----			Atlanta and Jacksonville.			
*	*	*	*	*	*	*
"Ninth-----			San Francisco, Portland, and Seattle.			
*	*	*	*	*	*	*
"Eleventh-----			New Orleans and Houston.			
*	*	*	*	*	*	*
"Twelfth-----			Los Angeles."			

1 SEC. 7. Section 1254 of title 28 of the United States
2 Code is amended by adding a new subsection (4) reading
3 as follows:

4 “(4) By appeal, where is drawn in question, the valid-
5 ity of a State statute or of an administrative order of a
6 statewide application on the ground of its being repugnant
7 to the Constitution, treaties or laws of the United States:
8 *Provided, however,* That this subsection* shall apply only
9 when the court of appeals certifies that its decision is in con-
10 flict with the decision of another court of appeals with respect
11 to the validity of the same statute or administrative order
12 under the Constitution, treaties, or laws of the United
13 States.”.

14 SEC. 8. This Act shall take effect on July 1, 1975.

93^D CONGRESS
2^D SESSION

S. 2990

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1974

Mr. BURDICK (for himself, Mr. GURNEY, Mr. HRUSKA, and Mr. McCLELLAN)
(by request) introduced the following bill; which was read twice and
referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi and the fifth judicial circuit; by designating Louisiana, Texas, and the Canal Zone as the eleventh judicial circuit; by dividing the ninth judicial circuit and creating a twelfth judicial circuit, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 41 of title 28 of the United States Code is
4 amended to read in part as follows:
5 “The thirteen judicial circuits of the United States are
6 constituted as follows:

1 judge of the ninth circuit as constituted the day prior to the
2 effective date of this Act, whose official station is within the
3 twelfth circuit as constituted by this Act, is assigned as a
4 circuit judge of such part of the former ninth circuit as is
5 constituted by this Act the twelfth circuit, and shall be a
6 circuit judge thereof.

7 SEC. 4. Where on the day prior to the effective date of
8 this Act any appeal or other proceeding has been filed with
9 the circuit court of appeals for either the fifth or the ninth
10 circuit as constituted before the effective date of this Act—

11 (1) If any hearing before said court has been held in
12 the case, or if the case has been submitted for decision, then
13 further proceedings in respect of the case shall be had in the
14 same manner and with the same effect as if this Act had not
15 been enacted.

16 (2) If no hearing before said court has been held in
17 the case, and the case has not been submitted for decision,
18 then the appeal, or other proceeding, together with the
19 original papers, printed records, and record entries duly
20 certified, shall, by appropriate orders duly entered of record,
21 be transferred to the circuit court of appeals to which it would
22 had gone had this Act been in full force and effect at the
23 time such appeal was taken or other proceeding com-
24 menced, and further proceedings in respect of the case shall
25 be had in the same manner and with the same effect as if

4

1 the appeal or other proceeding had been filed in said court.

2 SEC. 5. The President shall appoint, by and with the
3 consent of the Senate, such additional circuit judges for the
4 fifth, ninth, eleventh, and twelfth circuits as the Congress
5 may authorize by this Act.

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7 is amended to read in part as follows:

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9 “Terms or sessions of courts of appeals shall be held an-
10 nually at the places listed below, and at such other places
11 within the respective circuits as may be designated by rule
12 of court. Each court of appeals may hold special terms at
13 any place within its circuit.

“Circuits				Places			
*	*	*	*	*	*	*	*
“Fifth-----				Atlanta and Jacksonville.			
*	*	*	*	*	*	*	*
“Ninth-----				San Francisco, Portland, and Seattle.			
*	*	*	*	*	*	*	*
“Eleventh-----				New Orleans and Houston.			
*	*	*	*	*	*	*	*
“Twelfth-----				Los Angeles.”			

14 SEC. 7. Section 1254 of title 28 of the United States Code
15 is amended by adding a new subsection (4) reading as
16 follows:

17 “(4) By appeal, where is drawn in question, the valid-
18 ity of a State statute or of an administrative order of statewide
19 application on the ground of its being repugnant to the Con-
20 stitution, treaties, or laws of the United States: *Provided,*
21 *however,* That this subsection shall apply only when the

5

1 court of appeals certifies that its decision is in conflict with the
2 decision of another court of appeals with respect to the
3 validity of the same statute or administrative order under the
4 Constitution, treaties, or laws of the United States.”

5 SEC. 8. This Act shall take effect on July 1, 1975.

COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM

THE GEOGRAPHICAL BOUNDARIES OF
THE SEVERAL JUDICIAL CIRCUITS:
RECOMMENDATIONS FOR
CHANGE

WASHINGTON, D. C.
December, 1973

COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM
209 Court of Claims Building
717 Madison Place, N.W.
Washington, D. C. 20005
(202) 382-2943

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JUDGE J. EDWARD LUMBARD, Vice Chairman
A. LEO LEVIN, Executive Director

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Senator Quentin N. Burdick
Senator Edward J. Gurney
Senator Roman L. Hruska
Senator John L. McClellan

APPOINTED BY THE PRESIDENT

Honorable Emanuel Celler
Dean Roger C. Cramton
Francis R. Kirkham, Esq.
Judge Alfred T. Sulmonetti

APPOINTED FROM THE HOUSE

Congressman Jack Brooks
Congressman Walter Flowers
Congressman Edward Hutchinson
Congressman Charles E. Wiggins

APPOINTED BY THE CHIEF JUSTICE

Judge J. Edward Lumbard
Judge Roger Robb
Bernard G. Segal, Esq.
Professor Herbert Wechsler

Arthur D. Hellman, Deputy Executive Director
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SENATOR EDWARD J. GURNEY
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SENATOR JOHN L. MCCLELLAN
JUDGE ROGER ROBB
BERNARD G. SEGAL
JUDGE ALFRED T. SULMONETTI
HERBERT WECHSLER
CONGRESSMAN CHARLES E. WIGGINS

December 18, 1973

Honorable Richard M. Nixon
President of the United States
Washington, D. C.

Honorable Gerald R. Ford
President of the Senate
Washington, D. C.

Honorable Carl B. Albert
Speaker of the House of
Representatives
Washington, D. C.

Honorable Warren E. Burger
Chief Justice of the United States
Washington, D. C.

Gentlemen:

In accordance with the provisions of section 6,
paragraph (1), Public Law No. 489, Ninety-second Congress,
the Commission on Revision of the Federal Court Appellate
System herewith submits its report of recommendations for
change in the geographical boundaries of the federal judicial
circuits.

Respectfully yours,

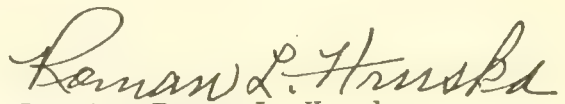

Senator Roman L. Hruska
Chairman

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I. INTRODUCTION

For more than a decade the United States Courts of Appeals - courts of last resort for all but a handful of federal cases - have been a source of continuing concern. During this period they have experienced an increase in case-loads unprecedented in magnitude. In Fiscal Year 1960, a total of 3,899 appeals were filed in all eleven circuits; with 69 authorized judgeships, the average was 57 per judgeship. In 1973 the filings had soared to 15,629; with 97 authorized judgeships, the average per judgeship was 161, almost three times the figure for 1960. The filings themselves increased 301 per cent during the same period, compared with an increase of only 58 per cent in district court cases.

This flood-tide of appellate filings has given rise to changes in internal procedures. Opportunity for oral argument has been drastically curtailed in a number of circuits. At the same time, the use of judgment orders and per curiam opinions has increased dramatically. Many of these changes may be desirable, worthy of emulation in their present form. Some may contain the germ of good ideas which need refinement if they are to be retained. Others may be no more than responses of the moment, designed to avoid intolerable backlogs, but generating concern in their implementation. Without passing judgment on any of them, suffice it to say that they present questions which merit careful study.

An increase in the volume of judicial business typically spawns new judgeships. The Fifth Circuit has grown to a court of 15 active judges, each of whom shoulders a heavy workload despite the use of extraordinary measures to cope with the flood of cases. Serious problems of administration and of internal operation inevitably result with so large a court, particularly when the judges are as widely dispersed

geographically as they are in the Fifth Circuit. For example, it becomes more difficult to sit en banc despite the importance of maintaining the law of the circuit. Judges themselves have been among the first to recognize that there is a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. In 1971 the Judicial Conference of the United States endorsed the conclusion of its Committee on Court Administration that a court of more than 15 would be "unworkable". At the same time, the Conference took note of and quoted from a resolution of the judges of the Fifth Circuit that to increase the number of judges on that court "would diminish the quality of justice" and the effectiveness of the court as an institution.

In terms of geographical size, the Ninth Circuit presents an even more striking picture; it ranges from the Arctic Circle to the Mexican border, from Hawaii and Guam to Montana and Idaho. With thirteen judgeships, it is the second largest in the country, both in terms of size of court and of case filings, and has serious difficulties with backlog and delay.

In recognition of the problems faced by the Courts of Appeals, the Congress created the Commission on Revision of the Federal Court Appellate System (P.L. 92-489 (1972)), directing it, in the first instance, "to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business." Taking note of the urgency of the need for relief, Congress provided that the Commission report to the President, the Congress and the Chief Justice within 180 days of the appointment of its ninth member.

The Commission has held hearings in ten cities; a preliminary report was widely circulated. The Commission has

received ideas and opinions on the alignment of the circuits from the bench and bar in every section of the nation. We have concluded that the creation of two new circuits is essential to afford immediate relief to the Fifth and Ninth Circuits.

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

In making its recommendations the Commission has relied primarily on data from Fiscal Year 1973. We have heard testimony concerning what the future may hold, and we appreciate the need for anticipating it. Making projections of future caseloads, however, is at best a risky business, and as specificity increases, confidence decreases. For example, in Fiscal 1973 the number of filings in the United States district courts decreased for the first time in at least a decade; yet it would be folly to predict from this alone a continuing downturn which would obviate the necessity for the changes we recommended in the Fifth and the Ninth Circuits. Moreover, as we look to the future we find many variables which will surely have some impact on caseloads but are nonetheless in-

capable of being integrated meaningfully in a statistical analysis. The Congress has before it proposed legislation which, if enacted, may bring significant relief to both the appellate and the district courts. Other legislation may give rise to new federal causes of action; new judicial doctrines may expand or contract access of litigants to the courts; patterns of litigation may change. Furthermore, caseload is but one of a number of factors relevant to the question of circuit realignment. Procedures which enhance the ability of the Courts of Appeals to dispose justly and efficiently of the business before them may well be of greater significance. The past decade has witnessed dramatic achievements on the part of the courts in their effort to keep pace with rising caseloads; greater efficiencies and productivity may yet be possible.

We have considered these factors, so difficult to predict or to quantify, and find it impossible to conclude that solutions can soon be found which will obviate the need for circuit realignment. Accordingly, we remain persuaded that the creation of two additional circuits is imperative at this time.

The Commission harbors no illusions that realignment is a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals. These problems are unlikely to be solved by realignment alone without destroying or impairing some of the most valuable qualities of the federal court appellate system. It is our opinion, however, that realignment is a necessary first step in the Fifth and Ninth Circuits, not only to afford relief to the pressing problems of the present, but also to provide a firm base on which to build more enduring reforms.

Our view that realignment of the Fifth and Ninth Circuits is a necessary initial measure is shared by the American Bar Association's Special Committee on Coordination of Judicial

Improvements. The American Bar Association itself, acting upon the report of that committee, has expressed its recognition of the "urgent need" for realignment of the Fifth and Ninth Circuits and its support for such a change.

The Congress in creating the Commission has recognized that however exigent a report on realignment, more is required. Accordingly, the governing statute directs the Commission, in the second phase of its work, to study the structure and internal procedures of the "Federal courts of appeal system," and to report its recommendations for such additional changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of due process and fairness."

In conformity with the mandate of the statute, the Commission herewith reports its recommendations for change in the boundaries of the several judicial circuits. We are not all of one mind on all issues, but we share the conviction that the situation in the Fifth and Ninth Circuits should not be allowed to continue. Work on the second phase of our assignment has already begun. We emphasize once again, however, that, whatever may emerge from that effort or from changes by the Congress or by the courts themselves which can now be envisioned, litigants in the Fifth and Ninth Circuits are entitled to that immediate and significant relief which our proposals would provide.

Creation of the new courts must be accompanied by authorization of judgeships sufficient to deal effectively with the volume of judicial business which litigants will bring before them. Accordingly, we recommend that the Congress, concurrently with realignment, create new judgeships adequate to man each of the courts affected by such legislation.

II. THE FIFTH CIRCUIT

The case for realignment of the geographical boundaries of the Fifth Circuit is clear and compelling. With 2,964 appeals filed in Fiscal Year 1973, this Circuit has by far the largest volume of judicial business of any of the Courts of Appeals -- almost one-fifth of the total filings in the 11 circuits. Although it is the largest federal appellate court in the country, with 15 active judges, it also has one of the highest caseloads per judge -- 198 filings in FY 1973, 23 per cent more than the national average. Geographically, too, the circuit is huge, extending from the Florida Keys to the New Mexico border.

Heavy caseloads in the Fifth Circuit are not a new problem. Proposals for dividing the circuit have been under serious consideration for some years, but instead additional judges were added. The caseload, however, has continued to grow and the active judges of the circuit, acting unanimously, have repeatedly rejected additional judgeships as a solution: to increase the number beyond 15 would, in their words, "diminish the quality of justice" and the effectiveness of the court as an institution.

To the credit of its judges and its leadership, the Court of Appeals for the Fifth Circuit has remained current in its work. It has been innovative and imaginative, avoiding what might have been a failure in judicial administration of disastrous proportions. The price has been high, however, both in the burdens imposed on the judges and in terms of the judicial process itself. This is the considered view of a majority of the active judges of the Court of Appeals for the Fifth Circuit who, joining in a statement which calls for prompt realignment, assert that "the public interest demands immediate relief" (emphasis in the original). Even 15, they emphasize, is too large a number of judges for maximum efficiency, particularly with respect to avoiding and resolving intra-

circuit conflicts. Pointing both to geographical area and to the number of judges, they conclude: "Jumboism has no place in the Federal Court Appellate System."

As a result of the pressure of a flood-tide of litigation, the court has instituted a procedure under which oral argument is denied in almost 60 per cent of all cases decided by it. The Commission has heard a great deal of testimony concerning this practice, but even among the strongest proponents of the Fifth Circuit's procedures there is the feeling that oral argument may have been eliminated in too many cases. Certainly this is the strongly held view of many attorneys who appeared before the Commission. The court has also decided an increasing proportion of cases without written opinions.

It is easier to perceive the problem than to propose a solution. At hearings in four cities in the Fifth Circuit, and in extensive correspondence with members of the bench and bar, we have heard opinions on a wide spectrum of possible realignments. The Commission considered numerous proposals before arriving at the conclusions presented in this report.

In considering the merits of the various proposals, we have given weight to several important criteria. First, where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created. Second, no circuit should be created which would immediately require more than nine active judges. Third, the Courts of Appeals are national courts; to the extent practicable, the circuits should contain states with a diversity of population, legal business and socio-economic interests. Fourth is the principle of marginal interference: excessive interference with present patterns is undesirable; as a corollary, the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change. Fifth, no circuit should contain noncontiguous states.

On the basis of these criteria, we have rejected a number of proposals. For instance, to divide the Fifth into three circuits without affecting any adjacent states would require the creation of three two-state circuits, one of which would be too small to constitute a viable national circuit; moreover, as stated above, we think it undesirable to proliferate two-state circuits.

Once we begin to consider realignment plans affecting adjacent circuits, the principle of marginal interference comes into play. For instance, Georgia could be moved into the Fourth Circuit only if one of the Fourth Circuit states were moved into yet another circuit. Similarly, if Florida, Alabama and Mississippi were placed in one circuit, and Georgia, Tennessee (now in the Sixth Circuit), and South Carolina (now in the Fourth Circuit) in another, both would have manageable caseloads, but at the cost of interfering significantly with two adjacent circuits.

Similar considerations suggested the rejection of various proposed realignments for the western section of the Fifth Circuit. A circuit composed of Texas, Louisiana, Oklahoma and New Mexico, for example, would have a much higher workload than is desirable. In addition, it would leave the Tenth Circuit with only 527 filings, smaller than any existing circuit except the First.

In its Preliminary Report of November 1973 the Commission presented three possible plans for realignment of the Fifth Circuit. After careful consideration of the responses of the bench and bar, and further study of possible alternatives, a majority of the Commission now recommends that the present Fifth Circuit be divided into two new circuits: a new Fifth Circuit consisting of Florida, Georgia and Alabama; and an Eleventh Circuit consisting of Mississippi, Louisiana, Texas and the Canal Zone. Such a realignment

satisfies all five of the criteria deemed important by the Commission. In particular, no one- or two-state circuits would be created; no other circuit would be affected.

Commission Recommendation

<u>Filings^{1/}</u> <u>FY '73</u>		<u>Filings</u> <u>FY '73</u>	
Fifth Circuit		Eleventh Circuit	
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Mississippi	143
	<u>1,500</u>	Canal Zone	<u>6</u>
			<u>1,464</u>

With nine judgeships for each of the new courts, the filings per judgeship in the new Fifth Circuit would be 167; in the Eleventh Circuit, 163. These figures may be compared with the national average in FY 1973 of 161. The circuits, it should be noted, are well balanced in terms of case filings.

^{1/} The Administrative Office of the United States Courts reports appeals from administrative agencies for each circuit, but not by state of origin. (The same is true with respect to original proceedings. These are relatively few in number and are here treated together with and considered as administrative appeals.) The figures in the text include, in addition to appeals from United States District Courts, an allocation to each state of administrative appeals in the same proportion to total administrative appeals in the circuit as the number of appeals from the District Courts within the state bears to the total number of District Court appeals within the circuit. In Fiscal Year 1973, the total number of administrative appeals and original proceedings in the Fifth Circuit was 218, which constituted 7 per cent of the circuit's total filings.

If for any reason the Congress should deem this proposal unacceptable, the Commission recommends enactment of one of the other two proposals presented in its Preliminary Report and set forth below. Either plan would represent a significant improvement over the current situation. The Commission expresses no preference between them.

Alternative No. 1

<u>Eastern Circuit</u>	<u>Filings ^{2/} FY '73</u>	<u>Western Circuit</u>	<u>FY '73</u>
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Arkansas	93
Mississippi	143	Canal Zone	6
	<u>1,643</u>		<u>1,414</u>

This alternative affects only one circuit other than the Fifth: Arkansas is moved out of the present Eighth Circuit, which has one of the lowest caseloads in the country. The addition of Arkansas to Texas, Louisiana and the Canal Zone avoids the creation of a two-state circuit.

This plan, however, does create a relatively large eastern circuit -- 1,643 filings in FY 1973. With nine judges the circuit would have 183 filings per judgeship, well above the national average of 161. It would nonetheless effect an eight per cent reduction from the present Fifth Circuit figure. Further, a court of nine judges rather than 15 could be expected to achieve a greater measure of efficiency in holding en banc hearings and circulating panel opinions among all of the judges so as to minimize the possibility of conflicts within the circuit.

Alternative No. 2

<u>Eastern Circuit</u>	<u>Filings ^{2/} FY '73</u>	<u>Western Circuit</u>	<u>Filings FY '73</u>
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Canal Zone	6
Mississippi	143		
	<u>1,643</u>		<u>1,321</u>

2/ See Footnote 1, page 9.

This alternative creates the same eastern circuit as Alternative No. 1, with the same disadvantages. It does create a two-state circuit in the west. It does not, however, alter any circuit other than the Fifth, and thus respects the principle of marginal interference.

III. THE NINTH CIRCUIT

The Ninth Circuit today handles more cases annually than any circuit other than the beleaguered Fifth. Since 1968 the number of appeals filed each year has consistently exceeded the number of terminations, resulting in a backlog of 170 cases per judgeship at the end of Fiscal Year 1973 -- enough to keep the court busy for a full year even if no new cases were filed. Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved. Whatever the reason, for two successive fiscal years, 1971 and 1972, there were no en banc adjudications. More recently, the court has accepted a number of cases for en banc determinations and appears to be doing so with increasing frequency. It remains to be seen whether this will serve further to exacerbate the problems of delay.

At the Commission's hearings, held in four cities of the Ninth Circuit, the vast majority of the witnesses recognized that some change in the structure of the circuit is necessary. It was also generally recognized that the problems faced by the court could not be adequately resolved by simply increasing the number of judges. Adding judges without more is no solution. The Fifth Circuit judges, having lived with a court of 15, have repeatedly gone on record as opposing any increase beyond that number. Indeed, a majority of the active judges of the Fifth find 15 too many. Some of the

Ninth Circuit judges, too, have pointed to the difficulties encountered by their own court of 13 in maintaining institutional unity. Indeed, in more ways than one the Ninth Circuit is close on the heels of the Fifth, where a majority of judges, despite their remarkable efforts to cope with a burgeoning caseload and a vast geographical area, have requested immediate relief. It should not be necessary for the Ninth Circuit to re-live the history of the Fifth Circuit before its problems of caseload and geographical size are ameliorated.

Accordingly, the Commission recommends that the present Ninth Circuit be divided into two circuits: a Twelfth Circuit to consist of the Southern and Central Districts of California and the states of Arizona and Nevada; and a new Ninth Circuit to consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California. Such a realignment will by no means solve all of the Ninth Circuit's problems for all time, but it will make them more manageable in the short run and establish a sound geographical base on which to build more fundamental reforms.

The Ninth Circuit's filings in Fiscal Year 1973 would have been allocated as follows if the division now recommended had been in effect:

<u>Twelfth Circuit</u>		<u>New Ninth Circuit</u>	
California - Southern	998	California - Northern	545
California - Central		California - Eastern	
Arizona	234	Alaska	26
Nevada	<u>70</u>	Washington	183
		Oregon	121
		Idaho	30
		Montana	36
		Hawaii	38
		Guam	<u>35</u>
TOTAL	1,302 ^{3/}		1,014

^{3/} Adjusted to reflect appeals from administrative agencies and original proceedings. In the Ninth Circuit, these constituted 16 per cent of the total filings in FY 1973. See Footnote 1, page 9.

With nine judgeships in the proposed Twelfth Circuit the court would have had 145 filings per judgeship, virtually equal to the filings per judgeship (144) in all of the circuits in FY 1973 excluding the three busiest. That figure also represents a decrease of 19 per cent from the Ninth Circuit's current rate of 178 filings per judgeship. The states of the new Ninth Circuit, of course, had a lower caseload and, depending on the number of judgeships provided, would have had at least as much relief.

The Commission has received a number of other plans for realignment of the Ninth Circuit. Most strongly pressed is the suggestion that California, Nevada, Hawaii and Guam constitute one circuit, that Arizona be shifted to the Tenth Circuit, and that a separate circuit be created to consist of Alaska, Washington, Oregon, Idaho and Montana, the five northwestern states. After careful consideration we have concluded that, for reasons developed below, this plan, too, is so clearly inferior to the recommended realignment that we have no choice but to reject it. Nevertheless, and without minimizing the difference in relative merits of the plans, the Commission is of the view that adoption of this proposal -- joining California, Nevada, Hawaii and Guam, shifting Arizona to the Tenth, and creating a northwestern circuit of the remaining states -- is preferable to leaving the Ninth Circuit as it is now.

We find the plan just described to be inferior in several respects. First, it appears highly undesirable at this juncture to create a new circuit which in Fiscal 1973 would have had close to 1,700 filings, particularly when much of the area it would encompass is expected to experience substantial growth. The crucial fact is that California today already provides two-thirds of the judicial business of the Ninth Circuit. To keep it intact, and to join it in a circuit with other states,

would make it impossible to provide adequate relief for the problems of the circuit. Second, to shift Arizona into the Tenth Circuit would violate the principle of marginal interference. It would involve moving a state into a different, existing circuit in the face of vigorous, reasoned objections concerning the impact of such a move. Relocation would take from the bench and bar at least some of the law now familiar to them. We have also heard extensive testimony about the close economic, social and legal ties between Southern California and Arizona and the more limited nature of such ties between Arizona and the Tenth Circuit with its seat at Denver. Moreover, opposition to such a plan has come from California as well as Arizona. Finally, as we develop more fully below, a separate circuit for the five northwestern states does not appear justified or desirable at this time.

Although the underlying problems of caseload and size facing the Fifth and Ninth Circuits are similar, realignment of the Ninth poses difficulties not encountered or raised in deliberations concerning the Fifth. Some of these considerations are discussed immediately hereafter.

1. A single state -- in this instance California -- should not constitute a single federal circuit.

A one-state circuit would lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states. The Commission believes that such diversity is a highly desirable, and perhaps essential, condition in the constitution of the federal courts of appeals. Moreover, only two senators, both from a single state, would be consulted in the appointment process; a single senator of long tenure might be in a position to

mold the court for an entire generation. Finally, a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that now obtains in the Ninth Circuit. In addition, it would do little to solve the existing problems of the Ninth Circuit because California now provides two-thirds of the caseload of the circuit as presently constituted.

2. Dividing the judicial districts of California between two circuits raises no insoluble or unmanageable problems.

The realignment plan we have recommended would divide the judicial districts of California between the new Ninth Circuit and the proposed Twelfth Circuit. The division of a state between two circuits would be an innovation in the history of the federal judicial system. The problems that may be anticipated fall into two broad classes: those involving actual or potential conflicting orders to a litigant, and those involving the promulgation of inconsistent rules of law in suits involving different litigants. Special concern has been voiced over the possibility of conflicting decisions as to the validity of state statutes or practices under federal law. However, after full consideration, we are convinced that any problems that might arise are of lesser magnitude and significance than those created by a single-state circuit, or any of the other proposals that have been suggested to us. In any event, they can be resolved by existing mechanisms and others that could readily be developed.

Conflicting judgments. Among the wide variety of mechanisms developed in the law to avoid repetitive litigation and conflicting judgments, at least half a dozen are explicitly designed or frequently used to deal with litigation arising

out of controversies crossing circuit boundaries. These include transfers between circuits, transfers of venue under 28 U.S.C. sec. 1404(a), consolidations by the Judicial Panel on Multidistrict Litigation, stays, injunctions, and statutory interpleader. Either in their present form or with modifications, these mechanisms would avoid many of the potential conflicts in the state divided between two circuits.

Conflicting legal rules -- issues of state law. The Commission has heard testimony to the effect that a division of California such as the one proposed will mean that two federal appellate courts rather than one would be interpreting California law. Of course, this may be true today. As the law governing choice of law has developed, every federal court may at some point be called upon to interpret California law. With litigation over mass torts such as airplane accidents and multi-state business transactions so common, we are neither surprised nor disturbed by a district court within one circuit applying the law of a state from another circuit. Moreover, even within California there are today four federal district courts which regularly interpret California law. Experience in the federal system shows that district courts within the same state may differ in their interpretation of state law. These differences may or may not be resolved by a Court of Appeals; if they are, the resolution may take years. Of central significance, on issues of state law both of the proposed circuits would be obliged to follow the well-developed jurisprudence of the California legislature and courts. This would be equally true in diversity cases and in cases involving federal claims which turn on points of state law.

Where unusual circumstances militate against federal decision of state-law issues, devices such as abstention and certification are available to delay or avoid federal adjudication (and thus the possibility of conflict) until resolution by the

California courts. Whether to provide for certification of doubtful state law issues, as some states have done, is of course for the California legislature to decide. Such legislation might be anticipated if it were thought that the federal courts were having undue difficulty in interpreting state law.

Forum shopping on issues of federal law. Witnesses at the Commission's hearings have expressed the fear that to divide California between two judicial circuits would foster forum-shopping by litigants whose cases turned on federal-law issues. We note, however, that opportunities for forum-shopping exist today in the federal courts, and that the decision to choose one court rather than another will depend on a variety of considerations. It is far from clear that forum shopping would increase if California were divided between circuits. It may be that litigants challenging laws of statewide application would have a greater incentive to forum-shop, but if this were felt to be a problem, Congress, using devices such as venue restrictions and transfer provisions, could restrict forum shopping (and avoid conflicts as well). Much the same may be said of litigation by state prisoners. In both contexts -- as in many others in our federal system -- a certain amount of forum shopping may be tolerable, especially if the alternatives are even less appealing.

Actions against state agencies. At the Commission's hearings in the Ninth Circuit several witnesses expressed concern that if the judicial districts of California were divided between two circuits, a state agency might be subject to conflicting orders of federal courts in the two circuits. The fear was also expressed that a state law or practice might be held valid in one of the circuits and invalid in the other.

When parallel lawsuits in the two circuits threaten either possibility, the mechanisms referred to above may be invoked to channel two actions into a single court. Even

if both lawsuits are permitted to proceed independently, they will often reach the same outcome, and unless the precedents are not clear, they may be expected to do so. If the two judgments are inconsistent, it will not necessarily follow that the state agency will have to violate one order to obey the other: for example, one court might require a change in procedures and the other approve the status quo, or one court might mandate broader relief than the other. Indeed, it is not easy to hypothesize cases in which the two courts' orders would be such as to make it impossible for the defendant to obey both. If such an impasse should occur, it would most likely result from so fundamental a clash of values that Supreme Court review would be appropriate; moreover, other procedures for the resolution of inter-circuit conflicts, either of broad applicability or specifically tailored to the Ninth and Twelfth Circuits, might be provided by the Congress. For example, in acting upon the realignment proposed by the Commission, Congress may wish to enact companion legislation providing for a single appellate resolution of multiple challenges to the federal validity of state laws. A model already exists for transfer and consolidation at the appellate level: 28 U.S.C. sec.2112(a). That section provides that when proceedings have been instituted in two or more courts of appeals with respect to the same order of an administrative agency, the proceedings are to be consolidated in the court where the first appeal was filed. Further, authority is granted to that court to transfer the proceedings to any other court of appeals for the convenience of the parties in the interest of justice. We emphasize, however, that our recommendation is not dependent on the creation of new procedures; we regard existing mechanisms as adequate for the problems that are foreseeable.

Federal court review of state governmental actions is a delicate matter whether in two circuits or one. The reluctance

to have federal courts interfere with state institutions or procedures is reflected in the requirement of exhaustion of state remedies, the various abstention doctrines, and the Anti-Injunction Acts. These statutes and doctrines will prevent many conflicts that might otherwise arise in a state lying within two circuits. We note, too, that the judges of each of the new courts may be expected to reflect an appropriate sensitivity to the consequences of conflicting decisions and a willingness to invoke the principles of comity and deference to a recent decision by a court of equal stature.

In short, the Commission agrees with the conclusion of the Committee on Coordination of Judicial Improvements of the American Bar Association that "the principles of federalism and the advantages which flow from infusion of judges from several states into a circuit considerably outweigh any disadvantages which might be generated if part of a state were placed in two or more circuits."

3. Creating two "divisions" within the present Ninth Circuit is not likely to solve the circuit's problems.

At the Commission's hearings testimony was received suggesting that rather than recommend realignment, the Commission should urge a "restructuring" of the Ninth Circuit into two "divisions." A major advantage of this scheme, in the view of its proponents, is that it would preserve the availability of judges from the less busy northern districts of the circuit for assignment to the undermanned southern districts. The Commission has concluded, however, that the proposal would generate more problems than it would solve.

In our view, demonstrated needs for more district judges should be met by measures which are directly responsive to that problem. Adding new judgeships is, of course, the most direct response. The Judicial Conference of the United

States has recommended added district judges for the Ninth Circuit, and the proposal is under active consideration in the Congress. Moreover, flexibility in the transfer of judges between circuits need not be limited to intra-circuit transfers. If necessary, the procedure could be modified, as, for example, by the promulgation of guidelines to assure adequate judicial manpower where needed and when needed. Special provisions might be made for transfers between circuits created from the present Ninth Circuit, until such time as the needs of the circuit were met on a permanent basis.

We note, too, that the Ninth Circuit today has 59 district judgeships. The recommendations of the Judicial Conference of the United States, if implemented, would bring the total to 70. These figures, of course, take no account of senior district judges. In a circuit stretching from the Arctic to the Mexican border, and including Hawaii and Guam, the administration of the work of such a large number of judges is bound to pose complex administrative problems. These problems have already come under the scrutiny of the Subcommittee on Judicial Machinery of the Senate Judiciary Committee. Whatever the difficulties in the past, it would be troubling to create an appellate structure designed to foster extensive use of intra-circuit district judge transfers as the solution of the manpower needs of the district courts.

The factual basis of the argument also deserves analysis. The three southern districts said to be dependent on the reserve judicial manpower from the northern districts are the districts of Central California (Los Angeles), Southern California (San Diego), and Arizona. In fact, however, the Central District in Fiscal Years 1972 and 1973 loaned considerably more judge days to the northern districts than it received from them. The District of Arizona has also given substantial help to the northern districts: in FY 1973 it received more than it gave, but in Fiscal 1972 the figures were reversed and it loaned more judge time to the northern

districts than it borrowed from them. The Southern District of California is indeed a borrowing court, but most of the visiting judges come from other southern districts or are senior judges from the northern districts. Senior judges have considerable discretion in deciding where they wish to sit, and under current practices may be assigned to districts outside their own more easily than active judges. Thus even with the recommended realignment they would be available to sit in the Southern District of California. To put the point more precisely, only one per cent of the total visiting judge-time received by the Southern District in Fiscal 1973 was from active judges of the northern districts.

Any scheme for restructuring the Ninth Circuit into divisions depends for its success on a mechanism for preserving a unified law within the circuit. The proposals we have received recognize this but defer the consideration of specific details on this crucial matter. Thus, it is difficult to predict how the divisions would operate. In all likelihood, however, the two divisions would soon act and be perceived as separate courts. As a result the circuit would be divided in fact though not in law. Enormous administrative difficulties might be created by the need to coordinate the activities of the two divisional headquarters and the directives of the two divisional chief judges. The present problems of avoiding intra-circuit conflicts would be exacerbated, inasmuch as only a proceeding that included judges from both divisions could speak with authoritative finality.

4. A separate circuit for the five northwestern states is not now warranted.

The appeals filed from the five northwestern states (Alaska, Washington, Oregon, Idaho, and Montana) in Fiscal Year 1973 accounted for only 17 per cent of the workload of

the circuit and totalled slightly less than the filings in the three-judge First Circuit, regarded as something of an anomaly within the overloaded federal appellate system. To create another small circuit would be undesirable. The Commission has heard testimony that the rapidly growing population and expanding business in the northwest will soon result in substantially increased litigation at the appellate as well as the trial level. Should these projections be borne out, a separate circuit for the four or five northwestern states may become appropriate.

IV. ASSIGNMENT OF JUDGES

If Congress enacts legislation to create new circuits, the Commission recommends that judges of affected existing circuits be assigned to the new circuit in which their official station is located. Choice as to their assignment is assured by the judges' ability to change their official station pursuant to 28 U.S.C. sec. 456. At some point before realignment becomes effective, however, the judges should be required to declare their intentions and to designate their desired official stations in accordance with the provisions of section 456. Their options will, of course, be limited by the number of judgeships authorized for each circuit by the Congress.

APPENDIX I

A. Data for Fiscal Year 1973

<u>Circuit</u>	<u>Authorized Judgeships</u>	<u>Filings FY '73</u>	<u>Terminations FY '73</u>	<u>Terminations After Hearing or Submission FY '73</u>	<u>Pending</u>	
					<u>End of FY '72</u>	<u>End of FY '73</u>
D. C.	9	1,360	1,288	601	1,220	1,292
First	3	401	370	223	166	197
Second	9	1,709	1,462	958	681	928
Third	9	1,197	1,281	723	839	755
Fourth	7	1,573	1,676	1,168	825	722
Fifth	15	2,964	2,871	2,092	1,636	1,729
Sixth	9	1,261	1,239	745	653	675
Seventh	8	1,117	1,088	630	892	921
Eighth	8	821	821	556	415	415
Ninth	13	2,316	2,140	1,347	2,033	2,209
Tenth	7	910	876	736	579	613
<u>All Circuits</u>	<u>97</u>	<u>15,629</u>	<u>15,112</u>	<u>9,779</u>	<u>9,939</u>	<u>10,456</u>

Source: AO Report

B. Data for Fiscal Year 1972

<u>Circuit</u>	<u>Authorized Judgeships</u>	<u>Filings FY '72</u>	<u>Terminations FY '72</u>	<u>Terminations After Hearing or Submission</u>	<u>Pending</u>	
					<u>End of FY '71</u>	<u>End of FY '72</u>
D. C.	9	1,168	1,001	466	1,053	1,220
First	3	421	385	255	130	166
Second	9	1,317	1,593	897	957	681
Third	9	1,179	1,201	675	861	839
Fourth	7	1,399	1,391	861	817	825
Fifth	15	2,864	2,662	1,877	1,434	1,636
Sixth	9	1,248	1,098	679	503	653
Seventh	8	999	882	443	775	892
Eighth	8	798	797	508	414	415
Ninth	13	2,258	1,968	1,221	1,743	2,033
Tenth	7	884	850	657	545	579
All Circuits	97	14,535	13,828	8,537	9,252	9,959

Source: AO Report

C. Data on Disposition Time

<u>Circuit</u>	<u>Median Time in FY 1973 from Filing of Complete Record to Final Disposition (Civil)</u>		<u>Median Time in FY 1973 from Filing of Complete Record to Final Disposition (Criminal)</u>	
	<u>Cases</u>	<u>Interval (Months)</u>	<u>Cases</u>	<u>Interval (Months)</u>
D. C.	237	14.5	282	10.2
First	138	4.5	60	6.4
Second	420	5.8	434	3.8
Third	415	10.6	220	6.1
Fourth	889	5.8	238	5.7
Fifth	1,445	5.2	484	4.3
Sixth	459	7.1	205	6.7
Seventh	354	12.0	207	9.6
Eighth	327	4.6	162	4.5
Ninth	536	13.8	646	4.9
Tenth	508	6.7	166	5.8
All Circuits	5,728	6.9	3,104	5.5

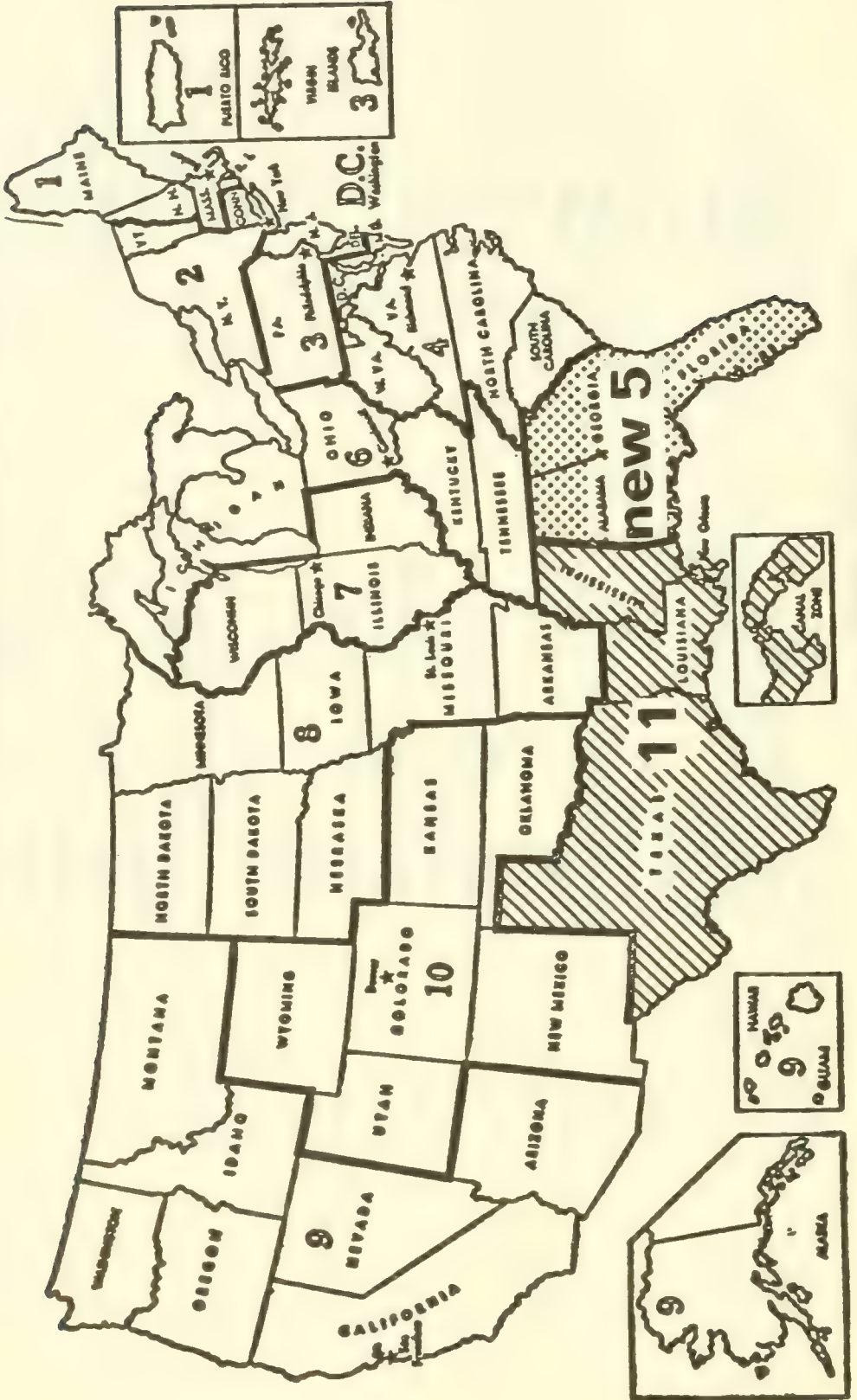
Source: AO Report

		Appeals Filed FY 1973
I. Fifth Circuit States		
Alabama		249
Florida		800
Georgia		451
Louisiana		477
Mississippi		143
Texas		838
Canal Zone		6
II. Eighth Circuit States		
Arkansas		93
Total of all other states		728
III. Ninth Circuit States		
Alaska		26
Arizona		234
California		1,543
Northern & Eastern	545	
Central & Southern	998	
Hawaii		38
Idaho		30
Montana		36
Nevada		70
Oregon		121
Washington		183
Guam		35

*State figures adjusted to reflect appeals from administrative agencies and original proceedings. See Footnote 1, page 9.

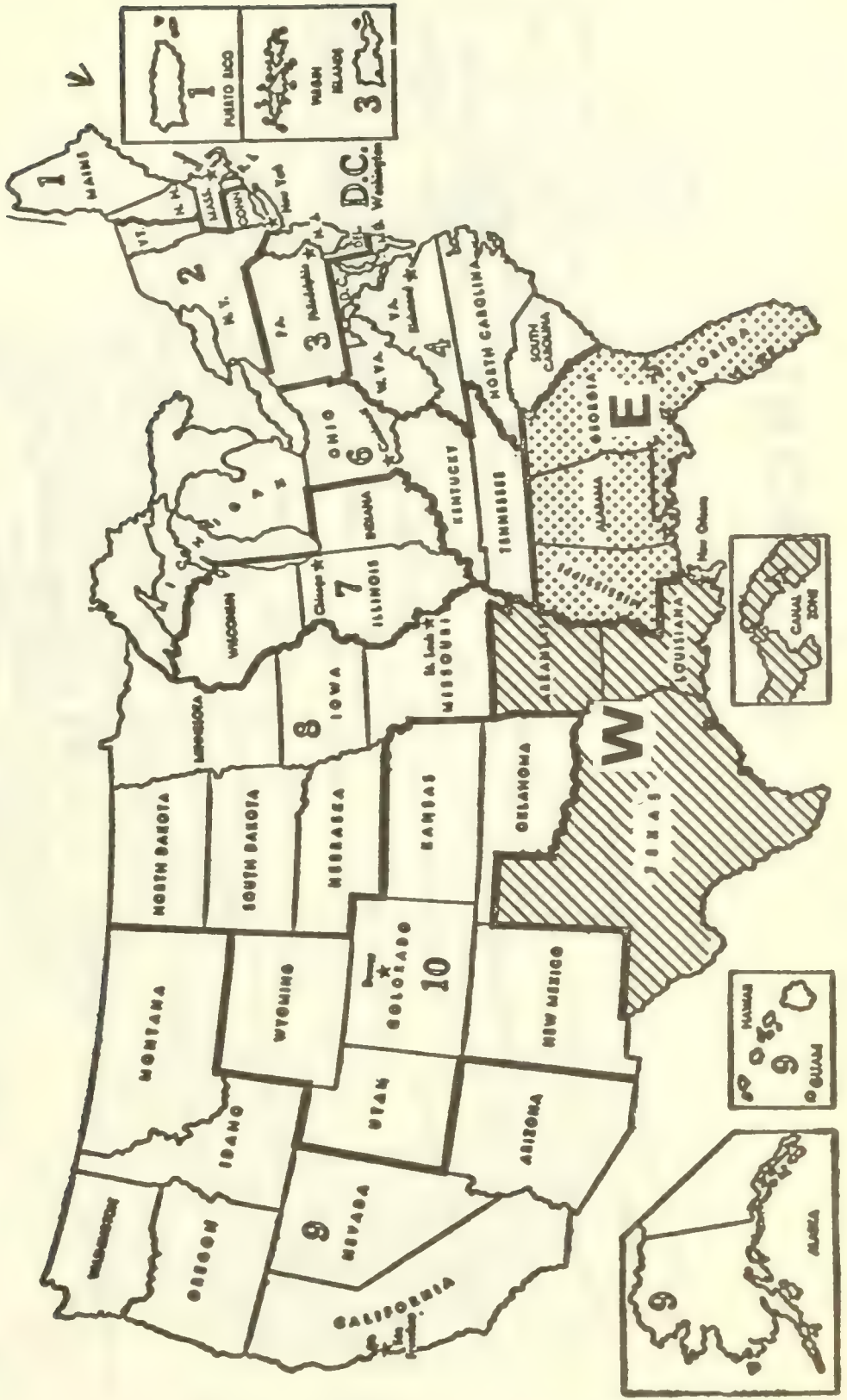
5th CIRCUIT

COMMISSION'S RECOMMENDATION



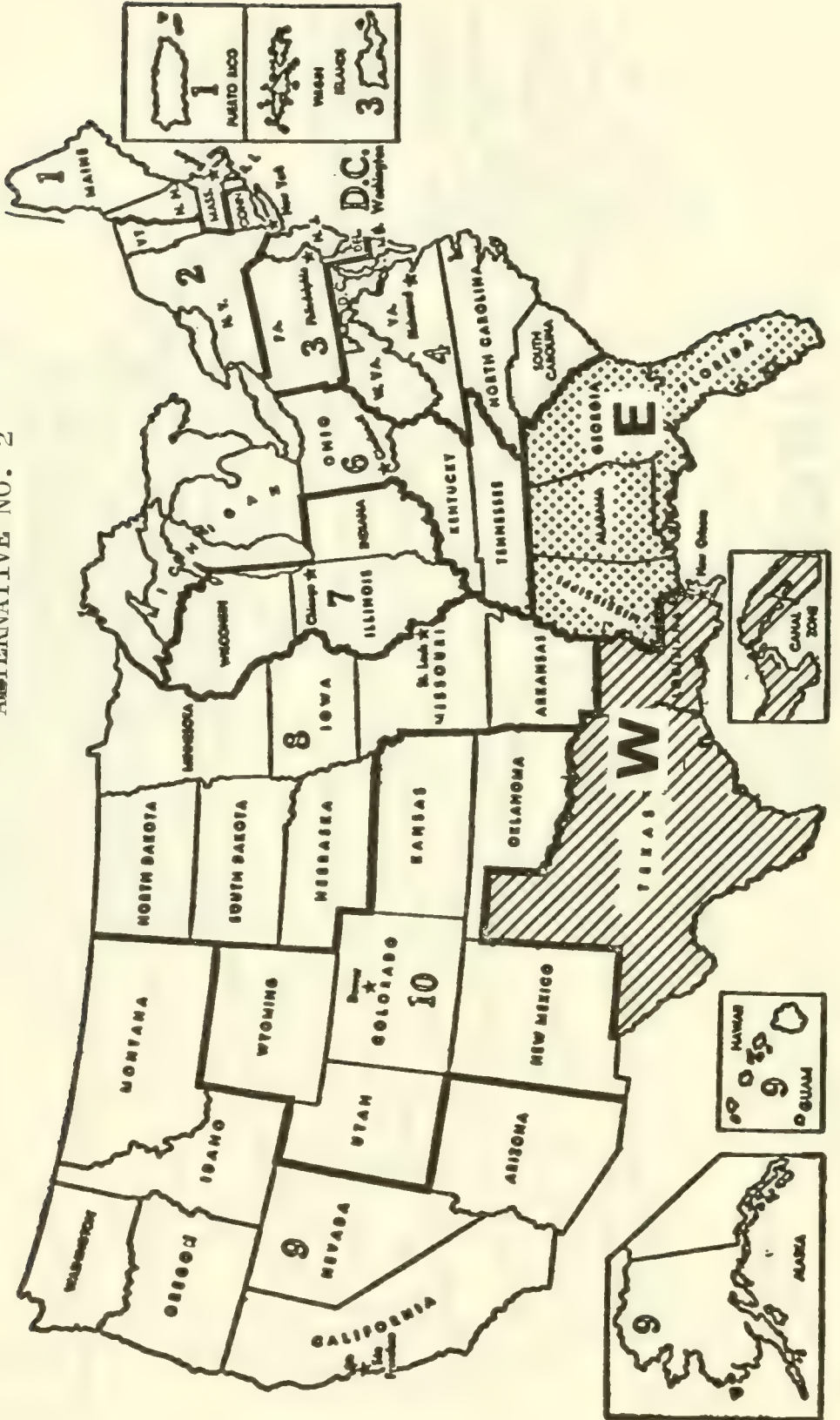
5th CIRCUIT

ALTERNATIVE NO. 1



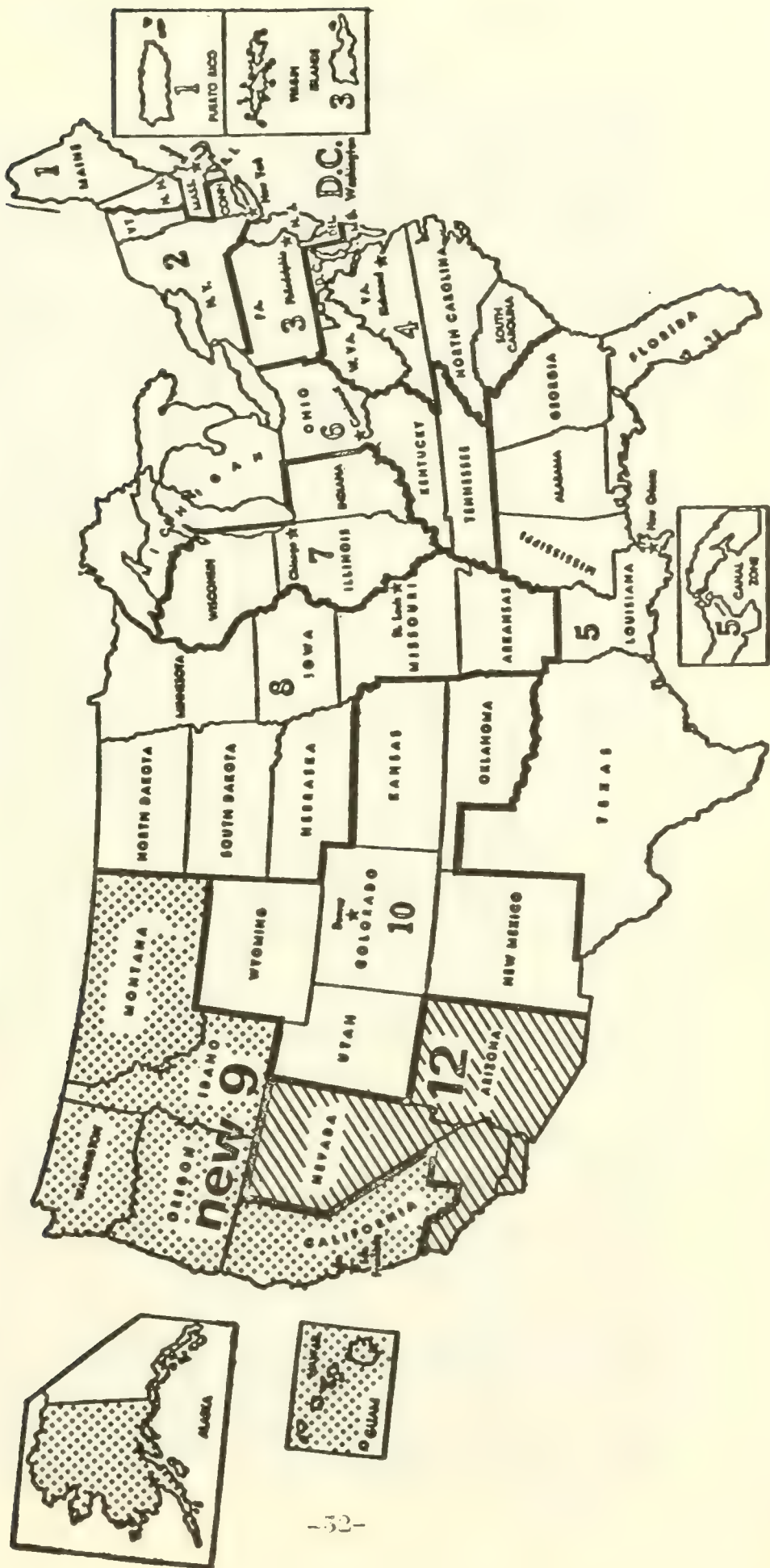
5th CIRCUIT

ALTERNATIVE NO. 2



9th CIRCUIT

COMMISSION'S RECOMMENDATION



U.S. Courts of Appeals
Caseload
By Circuits and Fiscal Years

CIRCUIT	Fiscal Year	Auth. J/ships	Pending July 1	Com-menced	Terminated	Pending June 30	Increase or Decrease
District of Columbia	1971	9	1011	1055	1013	1053	+42
	1972	9	1053	1168	1001	1220	+167
	1973	9	1270	1360	1288	1292	+72
	1974	9	1292	1243	1310	1225	-67
First	1971	3	97	383	350	130	+33
	1972	3	130	421	385	166	+36
	1973	3	166	401	370	197	+31
	1974	3	197	387	420	164	-33
Second	1971	9	1105	1423	1571	957	-148
	1972	9	957	1317	1593	681	-276
	1973	9	681	1709	1462	928	247
	1974	9	928	1802	1819	911	-17
Third	1971	9	866	1100	1105	861	-5
	1972	9	861	1179	1201	839	-22
	1973	9	839	1197	1281	755	-84
	1974	9	755	1216	1216	755	0
Fourth	1971	7	656	1211	1050	817	+161
	1972	7	817	1399	1391	825	+8
	1973	7	825	1573	1676	722	-103
	1974	7	722	1462	1201	983	+261
Fifth	1971	15	1407	2316	2289	1434	+27
	1972	15	1434	2864	2662	1636	+202
	1973	15	1636	2964	2871	1729	+93
	1974	15	1729	3294	2713	2310	+581
Sixth	1971	9	489	1015	1001	503	+14
	1972	9	503	1248	1098	653	+150
	1973	9	653	1261	1239	675	+22
	1974	9	675	1335	1207	803	+128
Seventh	1971	8	665	902	792	775	+110
	1972	8	775	999	882	892	+117
	1973	8	892	1117	1088	921	+29
	1974	8	921	1086	1110	897	-24
Eighth	1971	8	404	713	703	414	+10
	1972	8	414	798	797	415	-1
	1973	8	415	821	821	415	0
	1974	8	415	995	918	492	+77
Ninth	1971	13	1532	1936	1725	1743	+211
	1972	13	1743	2258	1968	2033	+290
	1973	13	2033	2316	2140	2209	+176
	1974	13	2209	2697	2551	2355	+146
Tenth	1971	7	580	734	769	545	-35
	1972	7	545	884	850	579	+34
	1973	7	579	910	876	613	+34
	1974	7	613	919	917	575	-38
ALL CIRCUITS	1971	97	8812	12788	12368	9232	+420
	1972	97	9232	14535	13828	9939	+707
	1973	97	9939	15629	15112	10456	+517
	1974	97	10456	16436	15422	11470	+1014

Source: Annual Reports of the Director, Administrative Office of the U.S. Courts

U.S. Courts of Appeals
Per-Judge Caseload
By Circuits and Fiscal Years

CIRCUIT	FISCAL YEAR	AUTH. J/SHIPS	FILINGS PER JUDGE	TERM. PER JUDGE	PENDING PER JUDGE
District of Columbia	1971	9	117	113	117
	1972	9	130	111	136
	1973	9	151	143	144
	1974	9	138	145	136
First	1971	3	128	117	43
	1972	3	140	128	55
	1973	3	134	123	66
	1974	3	129	140	54
Second	1971	9	158	175	106
	1972	9	146	177	76
	1973	9	190	162	103
	1974	9	200	202	101
Third	1971	9	122	123	96
	1972	9	131	133	93
	1973	9	133	142	84
	1974	9	135	135	94
Fourth	1971	7	173	150	117
	1972	7	200	199	118
	1973	7	225	239	103
	1974	7	208	171	140
Fifth	1971	15	154	153	96
	1972	15	191	177	109
	1973	15	198	191	115
	1974	15	219	180	154
Sixth	1971	9	113	111	56
	1972	9	139	122	73
	1973	9	140	138	75
	1974	9	148	134	89
Seventh	1971	6	113	99	97
	1972	8	125	110	112
	1973	8	140	136	115
	1974	6	135	138	112
Eighth	1971	8	89	88	52
	1972	8	100	100	52
	1973	8	103	103	52
	1974	8	124	114	61
Ninth	1971	13	149	133	134
	1972	13	174	151	156
	1973	13	178	165	170
	1974	13	207	196	181
Tenth	1971	7	105	110	78
	1972	7	126	121	83
	1973	7	130	125	88
	1974	7	131	136	82
ALL CIRCUITS	1971	97	132	128	95
	1972	97	150	143	102
	1973	97	161	156	108
	1974	97	169	158	118

Source: Annual Reports of the Director, Administrative Office of the U.S. Courts

U.S. Courts of Appeals
Time Intervals
By Circuits and Fiscal Years

Circuit	Fiscal Year	Auth. Filings	Submissions over 3 months	Med. Time A - R* (Civil)	Med. Time A - R* (Criminal)	Med. Time A - R** (Civil & Criminal)
District of Columbia	1971	9	41	1.2	4.1	11.2
	1972	3	45	1.3	3.2	12.4
	1973	3	50	1.2	1.8	11.7
	1974	9	58	1.3	2.4	12.8
First	1971	3	0	.7	.9	4.0
	1972	3	0	.4	.4	5.3
	1973	3	0	.4	.2	5.1
	1974	3	0	.5	.3	4.4
Second	1971	9	0	1.2	1.4	5.6
	1972	9	0	1.2	1.4	4.7
	1973	9	3	1.2	1.3	4.8
	1974	9	2	1.2	1.1	5.3
Third	1971	3	12	1.3	1.0	8.1
	1972	3	3	1.5	4.1	8.1
	1973	3	4	1.3	1.3	9.4
	1974	9	3	1.3	1.5	8.5
Fourth	1971	7	23	1.2	1.4	7.5
	1972	7	2	1.1	1.4	7.5
	1973	7	7	.9	1.4	5.8
	1974	7	7	1.4	1.7	7.0
Fifth	1971	15	40	1.5	1.9	6.5
	1972	15	15	1.4	1.8	6.3
	1973	15	43	1.3	1.5	4.9
	1974	15	74	1.3	1.5	5.5
Sixth	1971	3	2	1.2	2.8	7.7
	1972	3	4	1.3	2.8	7.5
	1973	9	5	1.3	2.7	7.0
	1974	9	22	1.3	2.8	7.2
Seventh	1971	8	13	1.3	2.3	10.7
	1972	8	22	1.4	2.4	11.4
	1973	8	35	1.4	2.3	11.1
	1974	8	57	1.3	1.7	10.3
Eighth	1971	8	15	2.6	3.0	6.0
	1972	8	7	2.7	2.5	5.3
	1973	8	1	2.5	2.5	4.5
	1974	8	6	2.1	2.3	4.1
Ninth	1971	13	12	1.6	3.0	10.6
	1972	13	41	1.9	2.4	9.4
	1973	13	65	2.0	2.3	7.3
	1974	13	62	2.1	1.8	6.2
Tenth	1971	7	23	1.6	2.4	7.8
	1972	7	16	1.5	2.1	7.0
	1973	7	19	1.4	2.3	6.3
	1974	7	3	1.6	2.0	6.9
ALL CIRCUITS	1971	97	220	1.3	2.5	7.6
	1972	97	188	1.4	2.3	6.6
	1973	97	232	1.3	1.7	6.4
	1974	97	291	1.4	1.7	6.8

* A reflection of median time in months from filing of notice of appeal to filing of the complete record (A = appeal; R = record).

**A reflection of median time in months from filing of complete record to final disposition (termination) (R = record; T = final disposition).

Source: Annual Reports of the Director, Administrative Office of the U.S. Courts

U.S. Courts of Appeals
Written Opinions Per Judge
Averages - Fiscal Years 1967 - 1974

Signed Opinions Per Judge								
Circuit	1967	1968	1969	1970	1971	1972	1973	1974
D.C.	18	17	27	19	21	20	19	19
First	26	29	31	33	38	39	42	61
Second	33	30	30	42	58	54	52	37
Third	24	20	18	21	23	38	27	24
Fourth	30	27	23	18	21	23	24	27
Fifth	34	32	41	49	45	40	45	41
Sixth	22	22	25	29	25	24	25	22
Seventh	35	30	36	40	41	39	38	34
Eighth	22	24	26	30	24	32	33	35
Ninth	41	25	30	34	29	35	38	34
Tenth	47	38	36	32	40	49	50	35
Nat'l Av.	30	27	30	33	34	36	36	33

Per Curiam Opinions Per Judge								
Circuit	1967	1968	1969	1970	1971	1972	1973	1974
D.C.	8	13	17	12	19	14	22	19
First	9	7	7	12	18	10	10	15
Second	13	11	10	14	18	17	10	11
Third	16	18	18	14	18	27	14	7
Fourth	18	21	20	28	40	65	63	52
Fifth	29	29	35	44	64	77	86	74
Sixth	13	11	12	25	32	44	54	49
Seventh	3	2	2	4	4	6	6	5
Eighth	4	4	5	8	15	23	21	19
Ninth	19	13	17	30	49	17	53	14
Tenth	14	29	19	31	37	35	45	14
Nat'l Av.	14	15	16	22	32	38	40	33

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case - F.Y. 1973

Circuit: Fifth

Circuit: Fifth

Type of Case and Opinion	Number of Cases	Av. Time Appeal-Record (days)	Av. Time Record-Last Brief (days)	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Average Time Appeal-Opinion (days)	Remarks
U.S. Civil - Signed Opinion	119	65	89	93	109	371	
Per Curiam	109	50	74	105	24	266	
Memorandum	-	-	-	-	-	-	
No Opinion	5	59	37	47	12	166	
Private Civil - Signed Opinion	263	76	69	108	108	374	
Per Curiam	381	61	62	75	17	237	
Memorandum	-	-	-	-	-	-	
No Opinion	16	66	46	44	18	188	
Prisoner Pet. - Signed Opinion	66	71	70	89	67	316	
Per Curiam	322	51	77	56	7	197	
Memorandum	-	-	-	-	-	-	
No Opinion	2	58	47	18	0	139	
Criminal - Signed Opinion	150	80	73	71	65	301	
Per Curiam	316	68	70	48	8	209	
Memorandum	-	-	-	-	-	-	
No Opinion	1	52	38	54	0	150	
Admin. Agency - Signed Opinion	56	10	133	103	113	365	
Per Curiam	58	328	93	69	27	528	
Memorandum	-	-	-	-	-	-	
No Opinion	-	-	-	-	-	-	
Recapitulation							
All Signed Opinions	674	68	79	95	94	349	
All Per Curiam	1248	72	70	70	13	239	
All Memorandum	-	-	-	-	-	-	
All No Opinion	29	57	44	35	12	165	
Circuit Average	1951	70	73	78	41	276	

Comparative Tables
Average Time For Stages of Appellate Review
Cases Terminated After Argument or Submission
By Circuit - Fiscal Year 1973

All Signed Opinions						
Circuit	Number of Cases	Av. Time Appeal-Record (days) [FRAP - 40 days]	Av. Time Record-Last Brief (days) [FRAP - 84 days]	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Av. Time Appeal-Opinion (days)
D. C.	166	47	163	181	166	567
First Cir.	126	28	134	26	58	247
Second Cir.	367	48	113	29	57	249
Third Cir.	239	65	122	130	75	404
Fourth Cir.	160	52	122	53	98	323
Fifth Cir.	674	68	79	95	94	349
Sixth Cir.	226	58	101	64	95	321
Seventh Cir.	302	86	177	96	109	468
Eighth Cir.	264	102	61	52	75	294
Ninth Cir.	504	94	119	187	112	528
Tenth Cir.	347	73	109	66	92	342

All Per Curiam Opinions						
Circuit	Number of Cases	Av. Time Appeal-Record (days) [FRAP - 40 days]	Av. Time Record-Last Brief (days) [FRAP - 84 days]	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Av. Time Appeal-Opinion (days)
D.C.	200	64	166	135	34	422
First Cir.	25	34	98	37	41	218
Second Cir.	80	49	112	39	21	225
Third Cir.	131	59	108	144	18	345
Fourth Cir.	327	57	111	47	32	263
Fifth Cir.	1248	72	70	70	13	239
Sixth Cir.	487	77	103	72	27	284
Seventh Cir.	51	60	153	120	76	420
Eighth Cir.	165	69	53	48	23	206
Ninth Cir.	697	87	100	134	30	365
Tenth Cir.	130	64	91	67	74	300

Circuit Averages - All Cases Argued or Submitted						
Circuit	Number of Cases	Av. Time Appeal-Record (days) [FRAP - 40 days]	Av. Time Record-Last Brief (days) [FRAP - 84 days]	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Av. Time Appeal-Opinion (days)
D.C.	586	63	167	152	68	466
First Cir.	199	32	122	26	45	229
Second Cir.	781	51	107	31	30	220
Third Cir.	683	54	115	134	31	344
Fourth Cir.	496	55	114	49	54	284
Fifth Cir.	1951	70	73	78	41	276
Sixth Cir.	742	69	103	69	47	293
Seventh Cir.	631	82	162	104	86	433
Eighth Cir.	513	85	57	49	48	245
Ninth Cir.	1343	90	108	156	60	428
Tenth Cir.	492	70	103	65	85	327

Committee Exhibit F

COMPARISON OF CASES ARGUED OR SUBMITTED
PER
AUTHORIZED JUDGESHIPS AND ACTIVE JUDGESHIPS

- - - - -

1st Circuit - (3 Judges):

Panel of Authorized Judges Averaged	211 Cases
Panel of Active Judges Averaged -	184 Cases
Active Judges Average Sitzings -	6 Weeks + 1 Day
Average Argued or Submitted -	5.1 Cases Per Day

2nd Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	264 Cases
Panel of Active Judges Averaged -	204 Cases
Active Judge Average Sitzings -	10 Weeks + 1 Day
Average Argued or Submitted -	4 Cases Per Day

3rd Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	233 Cases
Panel of Active Judges Averaged -	220 Cases
Active Judge Average Sitzings -	8 Weeks
Average Argued or Submitted -	5.5 Cases Per Day

4th Circuit - (7 Judges):

Panel of Authorized Judges Averaged -	164 Cases
Panel of Active Judges Averaged -	125 Cases
Active Judge Average Sitzings -	6 Weeks + 1 Day
Average Argued or Submitted -	4 Cases Per Day

5th Circuit - (15 Judges):

Panel of Authorized Judges Averaged -	
145 Oral Arguments + 220 Summary =	365 Cases
Panel of Active Judges Averaged -	
132 Oral Arguments + 220 Summary =	352 Cases
Active Judge Average Sitzings -	5 Weeks + 3 Days + Summary Calendar
Average Argued or Submitted -	4.7 Cases Per Day

6th Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	245 Cases
Panel of Active Judges Averaged -	209 Cases
Active Judges Average Sitzings -	8 Weeks + 2 Days
Average Argued or Submitted -	4.9 Cases Per Day

7th Circuit - (8 Judges):

Panel of Authorized Judges Averaged -	252 Cases
Panel of Active Judges Averaged -	186 Cases
Active Judges Average Sitzings -	6 Weeks + 1 Day
Average Argued or Submitted -	6 Cases Per Day

8th Circuit - (8 Judges):

Panel of Authorized Judges Averaged -	184 Cases
Panel of Active Judges Averaged -	180 Cases
Active Judges Average Sitzings -	7 Weeks + 1 Day
Average Argued or Submitted -	5 Cases Per Day

9th Circuit - (13 Judges):

Panel of Authorized Judges Averaged -	256 Cases
Panel of Active Judges Averaged -	158 Cases
Active Judges Average Sitzings -	9 Weeks + 3 Days
Average Argued or Submitted -	3.3 Cases Per Day

10th Circuit - (7 Judges):

Panel of Authorized Judges Averaged -	188 Cases
Panel of Active Judges Averaged -	141 Cases
Active Judge Average Sitzings -	6 Weeks
Average Argued or Submitted -	4.7 Cases Per Day

D. C. Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	199 Cases
Panel of Active Judges Averaged -	145 Cases
Active Judges Average Sitzings -	5 Weeks
Average Argued or Submitted -	5.9 Cases Per Day

Senator BURDICK. We are privileged to have with us today the distinguished senior Senator from Nebraska, the ranking minority member of the subcommittee, and the Chairman of the Commission on Revision of the Federal Court Appellate System. He is accompanied by Prof. Leo Levin, the Executive Director of the Commission. Gentlemen, the formal report of the Commission has been received for the record and all of us are generally familiar with its contents. The subcommittee would be pleased to receive your views on the general nature of the problem which I have outlined in my opening statement.

Senator Hruska.

STATEMENT OF ROMAN L. HRUSKA, SENIOR SENATOR FROM THE STATE OF NEBRASKA

Senator HRUSKA. Thank you, Mr. Chairman.

You have made a fine statement on the subject at hand. It is in keeping with your regular and usual conduct on occasions of this kind.

I note that it is not your expectation that the subcommittee will find unanimous support for any proposal, and I would say you are understating the matter very mildly indeed. I want to join you in that lack of expectation for unanimous support. It is well that such situations transpire because we want disclosure of any differing views from those which the Commission adopted and which the subcommittee is now processing.

I should like to make this statement, Mr. Chairman, in a dual capacity, not only as a member of this subcommittee, but also as a member of the Commission on Revision. I am pleased to be here to participate in the hearings scheduled on these bills, 2988, 2989, and 2990.

As the distinguished chairman of this subcommittee has observed, these bills would implement the alternative recommendations of the Commission of Revision of the Federal Court Appellate System.

I am pleased to acknowledge the presence of the distinguished counsel of the subcommittee, William P. Westphal, who has been a constant source of study and reliable help to the Commission in all of its work, and, of course, his usefulness to this subcommittee is legend of the first quality.

Back in 1972, Mr. Chairman, you observed, "The Federal court of appeals are afflicted with an illness. While it is not malignant, there is a potential prognosis of chronic incapacity or partial paralysis." The Commission on Revision in the course of its intensive study which led to its recommendations concerning circuit realignment found that this was indeed the case. In fact, the situation in 1973 was more serious than when you wrote in 1972.

No less significant is the fact that the workload of the courts of appeals continues to grow. The Commission filed its report in December of 1973. The statistics for fiscal year 1974 have now been made available by the Director of the Administrative Office of the U.S. Courts. They show that the filings in the courts of appeals over the courts of the country have again increased, this time by 5 percent. More significant, for our purposes, is the fact that for the two circuits which would be divided under these bills, the rise has been little short of dramatic. Filings in the fifth circuit rose 11.1 percent and in the ninth circuit 16.5 percent over the preceding year.

We have heard much concerning the desirability of awaiting results of the Commission's study with respect to the structure and internal procedures of the Federal courts of appeals system.

The Commission has been actively at work on this, which is the second phase of its assignment. We have heard many suggestions for change, and a variety of proposals and ideas are under active consideration.

However, in my judgment, none of these proposals would diminish the urgency of the need for the realignment of the fifth and the ninth circuits. On the contrary, some which are pressed most vigorously would add to the workload of our present courts, because they seek to reduce the prevalence of truncated procedures under which so many cases are decided without oral argument or any statement of the reasoning behind the decision.

The Commission submitted its recommendations, aware that it was for Congress to review these recommendations and the data upon which they were based. This subcommittee has embarked upon that process, beginning with a full and open review of the problems relating to circuit realignment. I know that the inquiry is in good hands, and that all of us, whatever our views on the particular issues, have in common a deep concern for the Federal judicial system and its well being. We are, all of us, aware of, and concerned about, the rising demands on our judicial system and the need to fashion solutions and to implement them promptly. That common concern will stand us in good stead as we seek to help the Federal courts to continue to fulfill this ultimate function; namely, to administer justice.

Mr. Chairman, there has been the argument that we ought to await action on these bills and hold them in abeyance until the Commission completes the second part of its assignment. That decision, however, was made a long time ago. It was made when we determined the order of these assignments in the legislation creating the Commission. That decision is made, and I submit that we ought to go forward with this legislation, after processing duly and properly. I am sure that will be done so that we can then be ready to undertake the final conclusion of the second part of our assignment in the Commission which will later be considered in this subcommittee and Congress.

I thank you for this opportunity to express myself.

Senator BURDICK. Thank you, Senator Hruska. Before hearing from Mr. Levin, let me enter into the record a prepared statement from Senator McClellan, a member of the Commission on Revision of the Federal Court Appellate System and a distinguished member of this committee, along with a resolution from the House of Delegates of the Arkansas Bar Association.

PREPARED STATEMENT OF SENATOR JOHN L. MCCLELLAN, HEARINGS BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, SEPTEMBER 24, 1974

Mr. Chairman, as stated in the December 1973 report of the Commission on Revision of the Federal Court Appellate System, of which I am privileged to be a member, "the case for realignment of the geographical boundaries of the Fifth Circuit is clear and compelling." The Fifth Circuit has by far the largest volume of judicial business of any of the Courts of Appeals, approximately one-fifth of the total filings in the eleven Circuits. Although it has fifteen active judges and is the largest Federal appellate court in the country, it also has one of the highest caseloads per judge—198 filings per judge in Fiscal Year 1973. Geo-

graphically as well, the circuit is huge, extending from the Florida Keys to the New Mexico border.

Because of these facts, for several years now serious proposals have been put forward for dividing the circuit. Instead of adopting such a course of action, however, additional judges have been added to the court over the years to cope with its ever-increasing caseload. That caseload has now reached the point where this solution will no longer answer the problem. The members of the court have themselves recognized that the "public interest" demands geographical realignment.

In approaching the question of realignment of the Fifth Circuit, one of the most important considerations of the Subcommittee should be to adopt the solution that will be least disruptive of the existing system—the Commission's principle of marginal interference. One of the greatest benefits of any system of laws is the sense of stability that it provides. To cavalierly reorganize the Federal circuits would disrupt that stability. Except for the creation of the Tenth Circuit in 1929, the present circuit boundaries have stood since the nineteenth century. Modification of these boundaries would take from the bench and bar of the affected States at least some of the law familiar to them.

It is for this reason that I oppose bill S. 2989, to the extent that it would remove the State of Arkansas from the Eighth Circuit and place it in a new Eleventh Circuit with Texas, Louisiana, and the Canal Zone. Any benefits that might accrue from such a change would be outweighed by its adverse consequences. The Commission's principle of marginal interference would be violated not only by placing Arkansas in a new circuit but by joining it in a circuit with two States with completely different legal histories. The laws of Texas and Louisiana have their historical background in the Napoleonic Code; while Arkansas is a common law State. This difference in legal background would simply intensify the instability that the modification of the circuits would cause.

For the reasons above, while recognizing the need for some modification of the Fifth Circuit's boundaries, I would oppose any solution that would result in moving Arkansas out of the Eighth Circuit.

Mr. Chairman, I would like to submit for the record a copy of a resolution of the House of Delegates of the Arkansas Bar Association calling for retention of the State in the Eighth Circuit.

RESOLUTION

Be it resolved by the House of Delegates of the Arkansas Bar Association, being duly convened in regular session on January 11, 1974, that the Arkansas Bar Association approves the report of the Commission on Revision of the Federal Court Appellate System. Since Arkansas has been in the Eighth Circuit for many years and the law of Arkansas is more akin to the laws of the states in the Eighth Circuit than to the laws of Louisiana and Texas, the State of Arkansas should remain in the Eighth Circuit.

Be it further resolved that a copy of this Resolution shall be furnished to Senator John L. McClellan, the Senior Senator from Arkansas and a member of the Commission on Revision of the Federal Court Appellate System.

JAMES E. WEST,
President, Arkansas Bar Association.

STATEMENT OF A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

Mr. LEVIN. Mr. Chairman, I am deeply honored to be allowed the opportunity to appear at these hearings on Senate bills 2988, 2989, and 2990, introduced to implement the recommendations of the Commission on Revision of the Federal Court Appellate System concerning circuit realignment. The problems besetting the U.S. courts of appeals are certainly familiar to the members of this committee, and for that reason I need not elaborate upon them here. As Senator Hruska, the distinguished Chairman of the Commission, has already indicated, developments since the Commission filed its report a few months ago demonstrate clearly that we can expect no abatement of

the problems. On the contrary, there continues, in the country overall, a steady increase in the workload of these courts. Filings during fiscal year 1974 rose to the highest level in the history of the U.S. courts of appeals, 16,436, an increase of a little more than 5 percent over fiscal year 1973. Of greater significance to this subcommittee, however, is the fact that the two circuits which are our primary concern today were among those with the most dramatic increases. In the fifth circuit there were 11.1 percent more cases filed in fiscal year 1974 than in fiscal year 1973; in the ninth the increase was 16.5 percent.

I should like, if I may, to focus first on the fifth circuit. Despite an exceedingly heavy workload per judge, that court has prided itself over the past several years on its ability to remain current and to be free of backlog. The report of the clerk of the fifth circuit for fiscal year 1974 states, however, that as a result of increased filings and a lowered output per active judge, the fifth circuit experienced a substantial increase in cases ready for oral argument but not calendared as of their cutoff date—and I quote—“resulting in a backlog of 120 cases (6 weeks of court).”

Perhaps more significant than the backlog itself is the onerous workload already being shouldered by the active judges of the fifth circuit. The clerk's report, referred to above, shows an average of 717 decisions per active judge. These include 351 opinions and participations and, in addition, a substantial number of petitions for rehearing and administrative-interim matters. It would hardly do to suggest that the solution lies in increased judicial output, even on a temporary basis.

One must pay tribute to the creativity of the judges of that circuit for what they have accomplished in keeping current during the past few years, through fiscal 1973. Nevertheless, that success had not been without a price. It is by now a familiar tale that in well over 50 percent of all the cases in that court, the opportunity for oral argument is denied to the parties. Similarly, in more than one-third of the cases there is no opinion, or, stated more accurately, there is a Rule 21 opinion which ordinarily includes nothing beyond the fact of affirmance and a reference to the decision of the court explaining that procedure. Moreover, in 418 cases, 23 percent of the court's decisions, there was both a Rule 21 opinion and a denial of oral argument.

It may bear mention that Judge Griffin Bell, one of the leading proponents of the system of screening cases to reduce oral argument or deny it altogether, appeared at a hearing of the Commission held in 1973 and expressed his view that the court was denying oral argument in too many cases. He suggested that a reduction of some 10 percent would be appropriate. However, the court has not been able to achieve the reduction called for by Judge Bell. Thus we see that the fifth circuit presents a picture of a court whose judges are working exceedingly hard and who are handling a huge caseload; a court which is using truncated procedures in a large number of cases; and yet, despite these Herculean efforts, a court in which a backlog has developed and promises to increase.

Moreover, with a court of 15 judges it is not easy to maintain the law of the circuit—that is, to avoid intracircuit conflicts. The fifth circuit has taken its obligation to hold en banc hearings most seriously. Indeed, of a grand total of 70 cases determined en banc over the country, 33 were in the fifth circuit. One should certainly be appreciative of the willingness of that court to sit en banc when

necessary, despite the burden on the individual judges; and one should note further that in all but four of these 33 cases the court allowed oral argument en banc. Yet, perhaps, one may be permitted to speculate that the need for so many en banc determinations is, in part, a result of the fact that the court is so large; that there are so many panels sitting. Further, with 15 judges sitting on each en banc hearing, the time consumed, time which might otherwise be spent hearing and determining other cases, is, to put it mildly, substantial. If we were to compare the time spent hearing and conferring on these 29 en banc determinations in which oral argument was held with the judge time which would be required if the court were composed of only nine judges, it becomes apparent that the extra six judges alone could readily decide close to 100 cases, according oral argument to each.

As the Commission emphasized in its report, a majority of the active judges of the fifth circuit have called for realignment now as the first step in solving the problems of the circuit. This is understandable, for it must be remembered that not so very long ago the court formally and officially, and I should add, unanimously, expressed its opposition to the creation of additional judgeships for the circuit, being of the view that the quality of justice would thereby be impaired.

As you know, the Commission has recommended a plan for creating two new circuits out of the present fifth. Its report, which has been included in the record of this subcommittee, provides the data as of fiscal year 1973, with respect to the resulting caseload under such a division. If I may, I should like to submit for the record the caseloads which would have resulted in fiscal 1974, both from the recommended plan and from each of the two alternatives which the Commission outlined in its report. These data are computed in the same manner as those in the Commission's report, but on the basis of fiscal year 1974 filings.

Commission recommendation

TABLE I

<i>Filings, fiscal year 1974</i>		<i>Filings, fiscal year 1974</i>	
Fifth circuit:		Eleventh circuit:	
Florida -----	800	Texas -----	1, 017
Georgia -----	469	Louisiana -----	534
Alabama -----	329	Mississippi -----	133
		Canal Zone -----	7
Total -----	1, 598	Total -----	1, 691

Alternative No. 1

Fifth circuit:		Eleventh circuit:	
Florida -----	800	Texas -----	1, 017
Georgia -----	469	Louisiana -----	534
Alabama -----	329	Arkansas -----	154
Mississippi -----	133	Canal Zone -----	7
Total -----	1, 731	Total -----	1, 712

Alternative No. 2

Fifth circuit:		Eleventh circuit:	
Florida -----	800	Texas -----	1, 017
Georgia -----	469	Louisiana -----	534
Alabama -----	329	Canal Zone -----	7
Mississippi -----	133		
Total -----	1, 731	Total -----	1, 558

It would appear clear that the need for circuit realignment of the present fifth circuit, with the creation of an additional circuit, is most compelling and, understandably, there is a sense of urgency with respect to the need for relief at the earliest possible moment.

I should like to turn now to the situation which the Commission found in the ninth circuit and to what has developed since the filing of the Commission's report recommending the division of that circuit and the creation of a twelfth circuit. Here, too, if I may, I should like to include in the record the 1974 caseloads for the two circuits recommended by the Commission.

TABLE II

Twelfth circuit:		New ninth circuit:	
California	1, 153	California	584
Southern		Northern	
Central		Eastern	
Arizona	264	Alaska	31
Nevada	128	Washington	217
		Oregon	144
		Idaho	36
		Montana	47
		Hawaii	55
		Guam	36
Total	1, 545	Total	1, 150

In addition, I should like to provide similar data for a plan which the Commission described in detail and characterized as preferable to doing nothing, but which it found so clearly inferior to the recommended plan that it could not recommend it even as an alternative. These figures are as follows:

TABLE III¹

Circuit X:		Circuit Y:	
California	1, 737	Alaska	31
Nevada	128	Washington	217
Hawaii	55	Oregon	144
Guam	36	Idaho	36
		Montana	47
Total	1, 956	Total	475

¹ N.B. Under this plan Arizona would be assigned to the tenth circuit.

It should be emphasized that the growth in filings in the ninth circuit has been one of the largest of any of the circuits. During fiscal 1974 there was an increase of 16.5 percent in the caseload as compared to the previous year. This is three times the rate of growth for the country as a whole.

The Commission recommended a plan under which two of the judicial districts in California would be assigned to the ninth circuit and two to a new twelfth circuit. It did this in large measure because of the large number of filings originating in the State of California. In fiscal 1974 there were almost 200 more filings attributable to California than there were in fiscal year 1973. Thus, that State alone, with appropriate adjustment for administrative appeals, generated 1,737 filings during that single fiscal year. If we put the fifth circuit to one side, this number of cases, attributable to the single State of California, was greater than that of any of the circuits except the second, and it approached the total filings in that circuit as well.

Much has been made of the fact that a great deal of the increase in the ninth circuit is attributable to litigation involving the Environmental Protection Agency. Certainly this should not be minimized; and yet it is relevant to note that in conferences with the staff of that agency, members of the Commission staff learned that no immediate diminution is in prospect. On the contrary, looking ahead, we can envision the EPA's generating a large volume of litigation in a variety of fields, and it is small consolation to private litigants who suffer from the resulting backlog to be able to point to the source of much of their trouble.

Perhaps it is desirable, at the risk of repeating a twice-told tale, to describe the impact of the situation in the ninth circuit on the individual civil litigant. As the chairman has pointed out, our search is for justice.

The Commission heard a great deal of testimony about civil cases which were delayed a year and a half and longer from the time of the filing of the last brief until the case was scheduled for oral argument. We have heard that it is the practice of certain Government agencies to file supplemental memorandums in ninth circuit civil cases precisely because of the long delays during which the law has changed. The median duration of cases tells some of the story, but it is also significant to study the Administrative Office report of cases under submission for more than 3 months as of June 30, 1974—cases already argued and heard or cases where briefs have been submitted to the panel. There were a total of 291 such cases in all of the courts of appeals of the country; more than 20 percent of them were in the ninth circuit. If we turn to cases that have been under submission for more than 9 months, then we find the ninth circuit responsible for 15 out of 36, or over 40 percent. These figures, it should be emphasized, represent the time that the litigants must wait for a decision after the case has been either argued or submitted. Clearly, another source of delay is in the period during which the litigants wait for oral argument or for submission.

No one would suggest that the judges of the ninth circuit are not burdened. As a result, that court has taken to assigning district court judges to the various panels of the courts of appeals, with serious negative reaction on the part of a number of members of the bar who testified at the Commission's hearings, as pointed out in the opening statement of the chairman.

A careful study of the practices in the ninth, compared with the other circuits, fully explains the source of the concern by the bar. Looking to the signed majority opinions handed down by the ninth circuit in fiscal year 1973, the latest year for which we have such data, we find that only 58 percent of them were written by active judges of that circuit, a little over half. This is the lowest percentage of any of the circuits. Another 15 percent were written by senior circuit judges, with 27 percent of the signed majority opinions written by other judges. Again, this figure of 27 percent is the highest in the country, and may be compared with a 6-percent figure for the second circuit, a 4-percent figure for the fifth, and 14 percent for the sixth. Most striking of all, however, is the fact that a total of 61 different judges wrote signed majority opinions of the court for the ninth circuit during that single fiscal year. This is more than twice the number of

judges writing opinions for the next ranking circuit and, for example, more than four times the number of judges who wrote signed majority opinions in the fourth circuit.

In these circumstances, maintaining the law of the circuit—avoiding intracircuit conflicts on doctrine or differing attitudes with respect to the application of accepted rules—becomes exceedingly difficult. To hold en banc hearings exacts a high price, although the ninth circuit did have five arguments en banc during fiscal 1974 and decided three other cases en banc without oral argument.

The conclusion seems inescapable that the ninth circuit has taken to reducing the number of oral arguments it will accord litigants. In fiscal year 1974 the total number of oral arguments—the absolute number—dropped by 21 percent as compared to fiscal 1973. What is important in the present context, however, is not that the court heard fewer cases as terminations increased, but rather that despite increased resort to truncated procedures, despite the use of so very many judges assigned to the panels from other duties, the court continued to fall behind in its work.

It appears clear at this juncture that the management of a circuit which extends from the Arctic Circle to the Mexican border, from Hawaii and Guam to Idaho and Montana, presents insurmountable problems. As already noted, the experience of the fifth persuaded the judges of that circuit unanimously to refuse to increase the number of active judgeships beyond 15. And it will be further recalled that the judges of the fifth, by an impressive majority, are seeking relief from their present situation. There is no need to have the ninth circuit relive the recent history of the fifth. The size of the ninth should be reduced, and it should be reduced now, before its caseload expands still further.

It is perhaps important to note that whereas we heard a great deal of sentiment for some structural change, serious concern was expressed—and has been expressed—about the proposal of the Commission to have two of the judicial districts of California assigned to one circuit and two to another. The Commission explored the problem and deliberated carefully concerning it. My colleague, Prof. Arthur Hellman, has written an article which appears in the May 1974 issue of the *University of Pennsylvania Law Review* entitled “Legal Problems of Dividing a State Between Federal Judicial Circuits.” It canvasses all of the problems involved and analyzes each most carefully. The results of his study were available to the Commission, which numbers among its members such leading scholars in the field of Federal jurisdiction and Federal courts as Dean Roger Cramton of Cornell Law School and Prof. Herbert Weschler of Columbia Law School. They concluded, as did Judge Ben C. Duniway of the ninth circuit, that the problems were neither insoluble nor unmanageable.

Finally, it may be appropriate to say a few words concerning the process utilized by the Commission in arriving at its conclusions with respect to each of the circuits. Hearings were held during August and the beginning of September 1973, not only in Washington, but also in four cities of the fifth circuit and four cities of the ninth circuit. There was extensive newspaper publicity concerning the ninth circuit hearings in both San Francisco and Los Angeles. A large number of witnesses, representing both bench and bar, testified. The witness list in

California alone included the following (to name only the members of the practicing bar) : Mayor Joseph L. Alioto of San Francisco; Moses Lasky, Esq.; John Bates, Esq.; Morris Doyle, Esq.; G. William Shea, Esq.; Lawrence Campell, Esq.; Marcus Mattson, Esq.; John Cleary, Esq., of the San Diego City Bar Association; and Leonard Sachs, Esq., on behalf of the Los Angeles Trial Lawyers Association. Of course, many who were invited to participate, both through a general invitation and as a result of specific inquiries, were not able to participate during that particular period of the summer.

Thereafter, a preliminary report was prepared and circulated widely. In addition, a copy of that report was published in the advance sheets of the West Publishing Co.'s Federal Reporter and Federal Supplement. The Commission received literally hundreds of communications expressing opinions concerning the preliminary report and the various proposals contained therein. The Commission also had before it a statement of the State Bar of California concerning the restructuring of the ninth circuit. In short, the Commission made every effort to gain the advantage of all ideas, comments, and reactions both with respect to these proposals and to a variety of other alternatives which were put forth during the course of its work.

As Senator Hruska noted, there are those who have suggested that circuit realignment should await completion of the Commission's report dealing with the structure and internal procedures of what the statute terms the Federal Courts of Appeals System. It is significant that in its report, the Commission noted that, in its view, realignment of the two largest circuits in the country is an essential preliminary step, as indeed the Congress had concluded, providing the basis on which to build firmly and soundly with respect to other changes which might develop. Some examples may prove helpful concerning this point. A proposal put forth by a special committee of the American Bar Association, presented to the Commission in great detail by Judge Shirley Hufstедler, provides for the creation of a new tribunal, but with the understanding that there would be no bypass of the present courts of appeal—that is, that cases would go to the new court only after they had already been decided by one of the regional courts of appeals. A large number of other suggestions, vigorously urged upon us, and referred to this morning, would augment the burdens of the present courts of appeals by increasing the proportion of cases in which oral argument is heard and discouraging the decision of cases without written opinions.

In short, what the Commission has recommended with respect to circuit realignment appeared to it then, and I am confident appears to it now, as an essential step regardless of what other recommendations may emerge from the work of the Commission in the course of the second phase of its assignment.

Thank you, Mr. Chairman.

Senator BURDICK. Thank you for a very fine statement, and we appreciate it.

I only have one or two questions.

I want you to understand that in these hearings this week we are dealing with the fifth circuit so that my questions won't be directed to the ninth circuit today. I presume you will be available later on with respect to the ninth circuit.

Mr. LEVIN. Yes indeed, Mr. Chairman. It would be my pleasure.

Senator BURDICK. In your statement, you say that the judges of the fifth circuit unanimously expressed their opposition to the creation of additional judgeships.

Mr. LEVIN. Yes, sir, Mr. Chairman.

Senator BURDICK. In other words, they take the position that, for the effective operation of the court, it should not exceed 15 judges at any time?

Mr. LEVIN. Mr. Chairman, to be entirely fair, this is the last formal expression of the court as such that was transmitted to the Judicial Conference of the United States. Whether the present court would now be unanimous in that view, I would not be authorized to state, but that was the unanimously expressed view as of the last official statement of the judges, and it was formally communicated.

Senator BURDICK. When was that expressed?

Mr. LEVIN. I believe that was expressed in about 1970--perhaps Judge Brown would know--it was not that long ago. I should say, also, that it was a position taken at a considerable personal sacrifice to the judges, because this meant that they were going to individually bear a greater burden and they underscored the fact there was the risk of affecting the quality of the judicial product.

Senator BURDICK. I understand that the judges of the ninth circuit made the same statement with regard to the ninth?

Mr. LEVIN. This I have not seen in formal fashion. They have 13 judges in the ninth, but we could verify that for you, sir.

I can say that the decision of the judges in the fifth, when they took that action, has been referred to by judges of the ninth.

Senator BURDICK. We will check into the ninth.

Mr. LEVIN. I will look into the matter and provide the clarifying information for the record.

[Mr. Levin's correspondence on this matter follows:]

COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM,
Washington, D.C., October 4, 1974.

Senator QUENTIN N. BURDICK,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: At the September 24 hearings of the Subcommittee on Improvements in Judicial Machinery a series of questions were posed concerning the experience of the Fifth Circuit with fifteen judgeships. These questions, put to several witnesses, focused both on when that Court reached its present size and, secondly, when the active judges of that Court resolved, unanimously, to oppose any increase in judgeships asserting that to have more than 15 judges "would diminish the quality of justice in the circuit." This resolution was adopted in October 1971 and is quoted in the published proceedings of the Judicial Conference of the United States, October 28-29, 1974. (A marked copy of the relevant pages is enclosed.)

It is noteworthy that the cited report includes language which makes it clear that the resolution of October 1971 was a reaffirmation of an earlier resolution. The Judicial Council of the Fifth Circuit, it recounts by way of preamble, "holds strongly to its prior formal determination," opposing an increase in size.

The Judicial Conference of the Fifth Circuit in October 1971 acted on the basis of substantial experience. The Court reached 13 judgeships in Fiscal Year 1967 (the legislation was enacted in March, 1966). It became a court of 15 during Fiscal Year 1969 (the legislation was enacted in June, 1968) and the Fifth Circuit had continued as a court of 15 through Fiscal Year 1969, Fiscal Year 1970 and Fiscal Year 1971 prior to the unanimous reaffirmation of opposition to a larger court referred to above.

Sincerely yours,

A. LEO LEVIN.

[The material referred to in Mr. Levin's letter of October 4, 1974, taken from pages 81-82 of the report of the proceedings of the Judicial Conference of the United States, October 28-29, 1971, follows:]

ADDITIONAL CIRCUIT JUDGESHIPS

After consideration of the recommendations of the Committee on Court Administration based on the quadrennial survey of the needs of the courts of appeals conducted by the Subcommittee on Judicial Statistics, the Conference agreed to recommend to the Congress the establishment of ten additional circuit judgeships, as follows:

Circuit:	Number	Circuit—Continued	Number
1st -----	1	8th -----	0
2d -----	¹ 2	9th -----	2
3d -----	1	10th -----	1
4th -----	2	District of Columbia -----	0
5th -----	0		
6th -----	0	Total -----	10
7th -----	1		

¹ Conditional upon certification of need by the Judicial Conference.

In making this recommendation the Conference noted that based on statistics alone seven additional judgeships would be warranted in the Fifth Circuit over and above the 15 now authorized and five additional judgeships would be warranted in the Ninth Circuit rather than the two recommended. The Conference agreed further with its Committee on Court Administration that to increase the number of judges in a circuit beyond 15 would create an unworkable situation. In this connection the Conference noted a resolution unanimously adopted by the judges of the Fifth Circuit in October 1971 in which the judges state that the Judicial Council "holds strongly to its prior formal determination that to increase the number of judges beyond 15 would diminish the quality of justice in this circuit and the effectiveness of this court to function as an institutionalized federal appellate court." The Judicial Council of the Fifth Circuit went on to endorse H.R. 7378, a bill to establish a Commission on the Revision of the Judicial Circuits as previously proposed by the Judicial Conference "as an indispensable first step toward improvement in the federal circuit court system."

Senator BURDICK. You have spent considerable time on the fact that oral arguments were denied in many cases. Is that necessarily bad? There are some cases where it was clearly stated that oral argument may not add anything to the case; is that not true?

Mr. LEVIN. Yes, I think it is true, Mr. Chairman.

I think the crucial point about denial of oral argument is not that we are suggesting it should be allowed in every case. Phrased differently, I would not suggest that oral argument should never be denied. But one of the leading proponents of the screening procedure—referred to by the Chief Judge as the father of the proposal—says that oral argument is being denied in too many cases, that it should be reduced by at least 10 percent; that has been said by one of the leading proponents. I think we should take a look at the cumulative effect of a number of new procedures. When we combine no oral argument with no opinion and, in view of the exigencies in the decision of many of these cases, no conferences eyeball to eyeball, then we have problems of a different order of magnitude.

Senator BURDICK. You are not advocating oral argument in all cases?

Mr. LEVIN. No, it doesn't rest on the notion that we ought to make possible oral argument in all cases; no, sir.

Senator BURDICK. Mr. Westphal?

Mr. WESTPHAL. Professor Levin, on this last point the chairman was making inquiry about, you mentioned that, in connection with the Commission's study of the fifth circuit problem, you held public hearings in Houston, New Orleans, and Jackson, Miss., and, at those hearings did you hear testimony from many members of the trial bar as well as officials of State bar associations?

Mr. LEVIN. Yes; we did.

Mr. WESTPHAL. Can you tell us what the attitude was of those members of the bar who appeared before your Commission at these hearings concerning these procedures in the fifth circuit which have involved screening of cases and denial of oral argument to the extent that you have indicated in your statement? What has been the attitude of the bar?

Mr. LEVIN. Mr. Westphal, I think it is appropriate to answer that by making two points. One, they are not, as you would expect the case to be, unanimous. But by and large, I think, they were deeply concerned that things were going too far. I think this is a fair characterization of the attitudes expressed to us. It would be very difficult to say they wanted things returned to the situation as it existed several years ago. There was deep concern expressed to us in the hearings.

We are having conducted for us a scientific survey in which 3,000 lawyers who have had cases before three circuits are being circularized with a carefully pretested questionnaire. The results are coming in. There are thousands of lawyers in the fifth circuit, but the rate of return is exceedingly high—beyond 60 percent. I would say that the first returns I have seen, preliminarily, support—on the basis of this kind of sample—a deep concern about the extent to which these truncated procedures have affected the appellate practices.

Mr. WESTPHAL. Can you tell us when your Commission plans to complete the contemplation of these returns you have received from members of the practicing bar?

Mr. LEVIN. We would hope within 6 weeks. We are not doing it ourselves, but indeed we may have a report which would be citable at that time.

Mr. WESTPHAL. Now, is your Commission planning to print or publish in some form the transcripts of the hearings conducted at these cities I have mentioned in the fifth circuit as well as the cities on the west coast?

Mr. LEVIN. Yes, sir.

Mr. WESTPHAL. In what stage is the publication of those transcripts?

Mr. LEVIN. We have received page proof on approximately a little over half. The rest has been promised for this week. My guess is, in some form, it should be usable within a month or 6 weeks and in final form maybe a month thereafter. This is a rough estimate, and the reason for it is, they have not been complying with their prior promises.

Mr. WESTPHAL. I assume there will be no problem in your making copies of that printed transcript available to the subcommittee so it can take legislative notice of the information that you gathered at your hearings in these places?

Mr. LEVIN. That was a major purpose, sir, of making it available in that form.

Mr. WESTPHAL. You have, in the course of the second phase of the Commission's study, received testimony from various members of so-

called specialized bars—the tax bar and patent bar, among others—concerning the feasibility or the desirability of creating specialized courts to handle either tax cases or patent cases or even perhaps both types of cases within the jurisdiction of one court. Has your study of that possibility produced an evaluation of the number of such cases which are filed in the courts of appeals from the various circuits, so that you can express an opinion as to whether the creation of such specialized courts, were they legislatively authorized, would take away from the 11 courts of appeals a sufficient caseload—and more particularly, from the fifth and the ninth circuits—to obviate the necessity of some kind of geographical realignment of those circuits?

Mr. LEVIN. Yes, sir. There are perhaps four major proposals which should be mentioned here. First is patent litigation, where there is the strongest support, although, again, the bar is not unanimous. The total caseload is less than 150. It was about 122 a year ago. It is simply not of an order of magnitude, even considering the weighted caseload, that has any impact at all on these conclusions.

The next field is tax. But there we heard from the counsel of the tax section of the American bar. They are strongly opposed to a specialized tax court, and I think it fair to say that most witnesses have very little support for a tax court as such.

What there is—and this gets to the third thing that ought to be considered—is the possibility of creating some kind of a tribunal which would not drain off all tax litigation, but which might more rapidly resolve intercircuit conflicts in the tax area. The volume of cases which are being talked about for that purpose is relatively small. The total number which people are talking about for such a tribunal—part of which would be tax cases, part administrative decision cases, part other things—might be 1,500 cases a year. These might well include cases of a significance in other areas that would be referred to in different ways.

As a result, I think I can say with some confidence that none of the major proposals before us, which have wide support, envision that kind of a siphoning off of caseload from the present regional circuits which would affect these conclusions.

Mr. WESTPHAL. Do you know of any other proposals with reference to changes in structure or procedure which might be employed by courts of appeals which could so lighten the workload of the 15 judges in the fifth circuit and the 13 judges in the ninth circuit so that, again, the necessity, as you urge, of realigning these circuits geographically, could be obviated?

Mr. LEVIN. Mr. Westphal, let me, if I may, respond in some detail. There are proposals for total changes with respect to the handling of administrative appeals. I think I can fairly say that, of the alternatives likely to be presented to the Commission, none would so siphon off these cases. I mention the next point because one of the possibilities going directly to your point about changes of procedures involves the notion that you lose the right of appeal but you have something like a certiorari procedure, or what Judge Wisdom likes to refer to as a writ practice. People have suggested this procedure for appeals in diversity cases. These are the kinds of proposals which are getting some kind of support—that is, the opposition immediately engendered isn't tremendously strong for cogent reasons. I think this leave-to-appeal procedure would go against what some have assumed to be

virtually a major premise, that there is a right in our system to at least one appeal, and not simply to one judge. That might save some time, although I don't know that it would still be of an order of magnitude sufficient to avoid the real problem.

The use of central staff has been urged by many and will be seriously considered by the Commission. But again, if we have to leave judging to judges, then I do not envision—from what I have seen, and we have carefully gone over Professor Meador's seminar work—that proposals for use of central staff, where they are to aid the judges in doing judging, would so affect the cases that realignment would not be necessary.

In short, if I may elaborate, I am not speaking at the moment substantively against any of these procedures. I am saying that, in terms of the safeguards people will necessarily require, I don't envision a change which would avoid the necessity for the realignment of these two circuits.

Mr. WESTPHAL. Now, the Congress recently passed legislation which extends the life of your Commission to September 1975, is that correct?

Mr. LEVIN. Yes, with a report due in June 1975.

Mr. WESTPHAL. I take it the President has signed that bill?

Mr. LEVIN. Yes, he has signed that bill.

Mr. WESTPHAL. So that the final report of your Commission will not be forthcoming until June of 1975.

I believe that is all the questions I have.

Senator BURDICK. I have just one more question.

You have testified regarding the attitude of the judges of the fifth circuit about adding additional judges to the 15 already there, and you stated that the Commission held several hearings in the fifth circuit. Was there any substantial amount of expression from members of the bar indicating that they would like to increase the number of judges and avoid splitting?

Mr. LEVIN. No, I recall none. I think the bar is appreciative of the problems in the circuit, but they are also aware of the difficulties involved as you get more than 15 judges.

Senator BURDICK. Then there is no likelihood of increasing the number of judges?

Mr. LEVIN. We have not found that.

Senator BURDICK. Thank you, Mr. Levin. Our next witness is Chief Judge Brown.

Welcome to the committee, Judge Brown.

STATEMENT OF CHIEF JUDGE JOHN R. BROWN, FIFTH CIRCUIT, HOUSTON, TEX., ACCOMPANIED BY THOMAS REESE, CIRCUIT EXECUTIVE

Judge BROWN. Mr. Chairman, I am grateful of the opportunity of once again appearing before this committee.

I would like to introduce my circuit executive, Mr. Thomas H. Reese, who is going to sit on my right side, violating military protocol, because he can't hear with his right ear.

Senator BURDICK. That's not such an unusual circumstance.

Mr. WESTPHAL. Mr. Reese, between the two of us, we have two good ears.

Judge BROWN. The chairman will recall that last spring, when we were trying desperately to get you to come down to the Judicial Conference in New Orleans, I explained to you that, in this situation, I could not expect to represent the full court as I would ordinarily as chief judge in congressional matters, since we were sharply divided on some underlying serious policy. I urged the committee to allow several judges to appear. Not only have you done that, but the committee itself has solicited the presence of all of the judges. Judge Wisdom, I understand, will follow me. Our views are pretty well parallel. Judge Gewin will present what I refer to sometimes as "the manifesto from the East," signed by nine judges who happen to live east of the Mississippi River, all of whom want an immediate split of the circuit now, but some of them say "we could continue to use the courthouse in New Orleans."

The Book of Job says, "Oh, that my adversary had written a book." Well, I have written so many books I am fearful that what I say today may be contradicted by what I have sometime previously said.

In working with your counsel I suggested that we introduce into the record of this hearing, my statement on Senate Joint Resolution 122, submitted at the hearing before the Subcommittee on Improvements in Judicial Machinery when I appeared before the chairman in May of 1972. I will now offer that statement.

Senator BURDICK. It will be received without objection.

[See appendix's "A" of this hearing record for the full text of Judge Brown's prepared statement to the subcommittee on May 9, 1972, concerning S.J. Res. 122, 92d Cong., 2d sess., which created the Commission on the Revision of the Federal Court Appellate System.]

Judge BROWN. I also suggested that my statement and testimony before Congressman Celler's Subcommittee on H.R. 7378 be admitted.

Senator BURDICK. Received without objection.

[See appendix's "B" of this hearing record for the full text of Judge Brown's prepared statement and the record of his testimony before Subcommittee No. 5 of the Committee on the Judiciary of the U.S. House of Representatives on June 21, 1971 on H.R. 7873.]

Judge BROWN. You have already received copies of my yellow-backed statement before the Commission on Revision, which appears to be a prodigious thing with lots of exhibits, and I would like to introduce that, too.

Senator BURDICK. It will be received for the file without objection.

[This statement has been retained in committee files and does not appear as an appendix in this hearing record.]

Judge BROWN. Then I am going to have the circuit executive make available to counsel a copy of our annual report for the year just concluded. In the report there are some confidential tables which show the performance of individual judges, and we suggest that that not be printed. In my report to the Commission we scrambled this so no one could identify the judges by name. The difference is very slight between the man on top and the man on the bottom.

Senator BURDICK. That document will be received for the file and not for the record.

[The document has been retained in committee files.]

Judge BROWN. I will ask Mr. Reese to work that out with Mr. Westphal. As I said, I have written a book.

In both my statements before the House committee and before this committee I said that the fifth circuit was for a circuit split.

Senator BURDICK. Was what?

Judge BROWN. Was for a circuit split. We firmly resolved that we supported, in principle, H.R. 7378 [92d Cong., 2d sess.]. I said I was, too, but with other things that ought to be tried before this one takes place, because I don't think it is going to achieve what the Commission seeks to achieve or what the legislation undertakes for it to achieve.

I am sorry that Senator Hruska is not present because I am going to be just a little critical of the Commission's report.

I think there are two basic places where I differ with their approach. No. 1, was that they looked just at two troubled areas, the fifth and the ninth circuits. So far as I can see they made no effort to look at the revision of the circuits as a whole, when I think, clearly, the congressional view was that it was time for it to be looked at. I don't want to talk about other circuits because some people get very sensitive about this, but one illustration is the Circuit for the District of Columbia. There is hardly a place in the structure of an intermediate Federal Court of Appeals for a single State or single area court of appeals. To what should the District of Columbia area adhere, the fourth circuit or the third circuit or the second circuit? Apparently the Commission has as a principle a thing they called a doctrine of marginal interference. I interpret this, really, as just the view of the judges of each of the circuits that you should just leave us alone.

Now, I am not one of those. We recognize that somewhere down the line here there has to be some change. One of the difficulties which I think faces this committee and the Congress, as it did the Commission, is that nearly every argument you make comes back to meet you head on.

For example, I am going to tell you in a few minutes here about why I don't think this is going to achieve what they are after, and in doing so, we will also see that we are facing a very, very substantial increase in our own burden. What are we going to do with it? My answer is that the proposal here isn't going to accomplish anything, and if the circuit should be split, we would only have to have it resplit again within a period of 3 to 4 years.

Another criticism of the Commission's approach is that they adopted this magic formula of nine. You will hear from Judge Gewin on that because nine of my judges feel that way. That is an impossible thing to achieve unless we have a structure of 35 appellate courts, because the frightening thing is not what is taking place in the fifth and ninth circuits today, but what will take place across the Nation in 1980. On the conservative projections of statistically straight-line projections of a pattern followed by Mr. Shafroth, Deputy Director of the Administrative Office, we will have over 35,000 appeals in the courts in 1980.

Senator BURDICK. Judge, are you aware of the Administrative Office's reports of the last 2 years on the district court caseload? There has been a leveling off there.

Judge BROWN. We have seen no indication——

Senator BURDICK. The Administrative Office report shows graphically that the caseload is going down a bit.

Judge BROWN. Well, I don't get as enthused as the Chief Justice does. I think the business is still there and is growing. I don't know that you will find in California, for example, that there has been any significant dropoff in filings, either criminal or civil. I don't happen to have the figures readily available.

This year they went up 3.3 percent. You are dealing with 150,000 cases. That is a large number in fiscal year 1974 over fiscal year 1973. If you are going to have nine-judge courts to service that number of cases in 1980, you are going to have to have close to 30 courts of appeals. That will mean not only one State with two courts of appeals, but one court of appeals for lower Manhattan and for several of the States in the fifth circuit. I maintain that, from the standpoint of the opportunity and capacity for the Supreme Court to give some kind of national policy, that is not a happy prospect. You will have far more intercircuit conflicts.

This argument cuts in a lot of different directions. In the first place, it demonstrates that we have to find something other than this magic number nine. We have to recognize that there is a place for a court of appeals in excess of nine judges.

No. 2, it also demonstrates that we have got to find new methods of handling these cases that are safe and acceptable to the bar and litigants.

The chairman asked Mr. Levin whether the bar was heard from in the hearings. They certainly were in the fifth circuit, and they were there because of actions I took. I found that the bar knew nothing about the hearings that were scheduled. I don't mean to imply any criticism of the Commission staff. The Commission had a limited staff and limited time. I took it upon myself as chief judge to notify the executive officers of each of the six bar associations, and they were well represented. We had the president of the State Bar of Texas, who spoke very vigorously. Then at each of the places, there were outstanding members of the bar from every State. It doesn't surprise me at all that the reaction of most of these lawyers was that they would like oral argument and that they were disturbed because we had to abandon it and had to go to the screening system. But many of them also expressed the view that, as between a court that is 2 years behind in hearings—as I understand the court is in the ninth circuit—with another year until decision, that, rather than wait 3 years for a decision, they would rather have the decision now and no oral argument. Whether they would get a court opinion would depend upon the case, whether it would be a Rule 21, a per curiam, or a signed opinion. This question wasn't adequately asked in the questionnaire which was sent to the judges and lawyers; it was a pure oversight. We called the Judicial Center to suggest that they ought to have that question in there. Well, as usual, it was too late when we got it to them. They had already sent the questionnaire out to the printer, although we had acted very diligently. So the questionnaire itself never asked the real question.

Another problem, of course, as Mr. Levin's statement points out, was the dissatisfaction expressed on the west coast at the prospect of 80 percent of the panels having a visiting judge on them.

Now, I think what I am really trying to say here is that the Commission, setting out to get some relief to the fifth circuit judges,

thought a nine-judge court was the answer for administrative convenience and for the work of the judges. If I can elaborate on that a little bit, if I understand my friends who signed the manifesto—and I think Judge Clark will sound it very vigorously tomorrow, as he did in Jackson, Miss., before the Commission—one of our problems is just the sheer labor of keeping up with the output of all 15 judges, plus some senior judges. You have to read slip opinions for 15 judges, 2255's, and petitions for rehearing en banc. I will demonstrate by some exhibits that I will offer, in a minute, that this hope for surcease is an illusion, because the volume that is predicted by sound projections for the next 2 or 3 years, and certainly by 1980, will show that, under any one of these three realignments in your three bills, there is going to be a need for judges as high as 15 and the volume of work will be as great as it now is.

I would like to offer, first, table 28. The reason I designated this "table 28," Mr. Westphal, is that in my Commission statement, the tables were marked 1 through 27; I thought it would be a little simpler, if you were to refer to those, if you didn't have two tables with the same number. This is for the business of the fifth circuit as presently constituted from 1973 to 1977:

[The table follows:]

BROWN TABLE 28.—FISCAL YEAR PROJECTIONS 1973-77

	1973 (actual)	1974	1975	1976	1977
A.O. projections.....	2,964	3,308	3,652	3,996	4,340
Brown projections.....	2,964	3,388	3,812	4,236	4,660

The first line is the Administrative Office projections. These were the ones that were developed by the Administrative Office for the use of Judge Butzner's committee on the 1976 omnibus circuit judgeship bill and in response to a request from the fifth circuit. They comprise I think three different projections. The straight line method, showing the increase based upon the filings of the immediate past 5 years, was the one that we used. It shows that in 1975 we are going to have 3,652 cases in the fifth circuit and 4,340 in 1977. Our clerk estimates that if he waits a little bit this will rise to about 3,875, and to 4,660 in 1977.

I also have three different tables labeled Brown tables 30, 31, and 32. Table 30 covers the Commission recommendation to split the circuit into Florida, Georgia, and Alabama in the East, and Texas, Louisiana, Mississippi, and the Canal Zone in the West. Table 31 covers Commission alternative No. 1, which places the four States east of the river together and Texas, Louisiana, Arkansas, and the Canal Zone together. Table 32 covers the second alternative, which places the four States east of the Mississippi River in one circuit, and Texas, Louisiana, and the Canal Zone in another circuit.

[Tables 30, 31, and 32 follow:]

BROWN TABLE 30.—COMMISSION RECOMMENDATION

	Filings for fiscal year—											
	1977					1977						
	1973 ¹	1974 ²	1975	1976	5th circuit project	AO project	1973 ¹	1974 ²	1975	1976	5th circuit project	AO project
5th circuit:												
Florida.....	800	801	976	1,117	1,258	1,166	838	1,018	1,023	1,171	1,319	1,238
Georgia.....	451	470	550	629	708	656	477	535	582	667	750	703
Alabama.....	249	330	304	347	391	362	143	133	174	199	224	206
Mississippi.....							6	7	7	8	10	9
11th circuit:												
Texas.....							1,464	1,693	1,786	2,045	2,303	2,156
Louisiana.....							8	8	8	8		
Mississippi.....							183	212	223	256	288	269
Canal Zone.....												
Total.....	1,500	1,601	1,830	2,093	2,357	2,184						
Present authorized judgeships.....	7	7	7	7								
Caseload per judge without adding new judges.....	214	229	261	299	337	312						
Caseload with maximum 9 judgeships for each new court.....	167	178	203	232	261	243						
1973 5 circuit average caseload.....	198	198	198	198	198	198	163	188	198	227	256	239
1973 national average caseload.....	161	161	161	161	161	161	198	198	198	198	198	198
Judgeships needed in new circuits to maintain national average.....	9.3	9.9	11.4	13.0	14.6	13.6	161	161	161	161	161	161
							9.1	10.5	11.1	12.7	14.3	13.4

¹ Based on Commission figures found on p. 9 of the Report of the Commission on Revision of the Federal Court Appellate System, December 1973.

² Computed as indicated in the Commission report referred to above. See footnote on p. 9.

BROWN TABLE 31.—COMMISSION ALTERNATIVE RECOMMENDATION NO. 1

Filings for fiscal year—												
1977							1977					
	1 1973	2 1974	1975	1976	5th circuit project	AO project	1 1973	2 1974	1975	1976	5th circuit project	AO project
Eastern circuit:												
Florida.....	800	801	976	1, 117	1, 258	1, 166	838	1, 018	1, 023	1, 171	1, 319	1, 234
Georgia.....	45	470	550	629	708	656	477	535	582	667	750	703
Alabama.....	249	330	304	347	391	362	93	103	113	123	133	94
Mississippi.....	143	133	574	199	224	206	6	7	7	8	10	9
Western circuit:												
Texas.....	1, 643	1, 734	2, 004	2, 292	2, 581	2, 390	1, 414	1, 663	1, 725	5, 969	2, 212	2, 040
Louisiana.....	9	9	9	9	9		7	7	7	7		
Arkansas.....	182	193	223	254	287	265	202	237	246	281	316	291
Canal Zone.....												
Total.....	1, 643	1, 734	2, 004	2, 292	2, 581	2, 390	1, 414	1, 663	1, 725	5, 969	2, 212	2, 040
Present authorized judgeships.....												
Caseload per judge without adding new judges.....	9	9	9	9	9		7	7	7	7		
Caseload with maximum 9 judgeships for each new court.....	182	193	223	254	287	265	202	237	246	281	316	291
1973 5 circuit average caseload.....	198	198	198	198	198	198	157	185	192	219	246	226
1973 national average caseload.....	161	161	161	161	161	161	198	198	198	198	198	198
Judgeships needed in new circuits to maintain national average.....	10.2	10.8	12.4	14.2	16.0	14.8	161	161	161	161	161	161
							8.8	10.3	10.7	12.2	13.7	12.7

¹ Based on Commission figures found on p. 9 of the "Report of the Commission on Revision of the Federal Court Appellate System," December 1973.

² Computed as indicated in the Commission report referred to above. See footnote on p. 9.

BROWN TABLE 32.—COMMISSION ALTERNATIVE RECOMMENDATION NO. 2

	Filings for fiscal year											
	1977						1977					
	1 1973	2 1974	1975	1976	5th circuit project	AO project	1 1973	2 1974	1975	1976	5th circuit project	AO project
Western circuit:												
Eastern circuit:												
Florida	800	801	976	1,117	1,258	1,166	838	1,018	1,023	1,171	1,319	1,238
Georgia	451	470	550	629	708	656	477	535	582	667	750	703
Alabama	249	330	304	347	391	362	6	7	7	8	10	9
Mississippi	143	133	174	199	224	206						
Total	1,643	1,734	2,004	2,292	2,581	2,390	1,321	1,560	1,612	1,846	2,079	1,950
Present authorized judgeships	9	9	9	9			6	6	6	6		
Caseload per judge without adding new judges	182	193	223	254	287	265	220	260	268	307	346	325
Caseload with maximum 9 judgeships for each new court	182	193	223	254	287	265	147	173	179	205	231	216
1973 5 circuit average caseload	198	198	198	198	198	198	198	198	198	198	198	198
1973 national average caseload	161	161	161	161	161	161	161	161	161	161	161	161
Judgeships needed in new circuits to maintain national average	10.2	10.8	12.4	14.2	16.0	14.8	8.2	9.7	10.0	11.5	12.9	12.1

¹ Based on Commission figures found on p. 9 of the "Report of the Commission on Revision of the Federal Court Appellate System," December 1973.

² Computed as indicated in the Commission report referred to above. See footnote on p. 9.

Now, I ask you to look at table 32, because—while this may be a political judgment on my part, for which I have no competence at all—I would say that if the circuit is split this is the one most likely to pass the Congress. Saying that, I am satisfied that every judge who appears from the fifth circuit will say that no one has any objection to having any State within the grouping. In any split, I welcome Mississippi or Alabama. I'm sure we welcome all of the States.

Now, you will notice that on these tables the figures, including those for fiscal 1974, are actual Administrative Office figures with the adjustment made in the Commission's report for administrative agency's cases. I was pleased with the results, because these statistics are so easy to fool with, yet these figures turn out to be within one or two of the totals in Mr. Levin's table in his prepared statement.

If you will notice, on the left-hand side of table 31, in the year 1975, there will be 2,004 cases in the eastern circuit. On the basis of the national average caseload of 161 cases per judge you will need 12.4 judges. In the year 1977, which is just the day after tomorrow, you will need 16 judges according to the fifth circuit projections, and 14.8 judges according to the Administrative Office projections. We don't have any 0.8 judges, so that means 15 judges.

In the western circuit you are going to have, as each of these years passes by: in 1975, 10 judges; in 1976, 12 judges; and in 1977, 13 judges.

I don't know where anybody is going to get any real relief out of this. Does it mean that we will go back to split that circuit again a third time to keep this number down to nine? What are my poor brothers in the eastern circuit going to do with our projection of 2,581 cases in 1977—or the Administrative Office Projection of 2,390 in 1977, which is about what we have now—as far as keeping up slip opinions, en bancs and so on?

In table 29, there is a recap of this which sets it out very pointedly; it gives the gross figures for each of the three alternatives.

[The table follows:]

BROWN TABLE 29.—CIRCUIT JUDGESHIPS NEEDED NOW

	Current authorized judgeships	Needed for fiscal year 1973 caseload	Judgeships needed fiscal year 1977 in new circuits to main- tain national average	
			Brown project	A.O. project
New 5th circuit.....	7	9.3	14.6	13.6
New 11th circuit.....	8	9.1	14.3	13.4
Alternate No. 1—East Circuit.....	9	10.2	16.0	14.8
Alternate No. 1—West Circuit.....	7	8.8	13.7	12.7
Alternate No. 2—East Circuit.....	9	10.2	16.0	14.8
Alternate No. 2—West Circuit.....	6	8.2	12.9	12.1

Now I've been thinking about the serious types of cases. You can take a look at page 5 of the clerk's report. I won't undertake to state the figures now, but they show the breakdown of criminal cases by States, both in 1973 and 1974. I added these up and out of 674 cases, over 350 will go to the eastern circuit and 324 will go to the western circuit. This is very significant because this is a big part of our business now. Habeas corpus is much the same, but mostly the work is in the direct criminal appeals. We have very substantial problems in criminal law: search and seizure, fourth amendment, fifth amendment,

and sixth amendment problems. These are some of the most vexing cases. So there is not going to be any real relief there.

Now, there are two or three other things. Since the prospect is that within the first year, certainly within the second year, and positively within the third year each of these two newly created courts will be a court way in excess of nine judges and will be at almost the same size that we are now, we ought to hesitate long and hard before we tear to pieces the great traditions of our court as it is now operating. We should experiment with every other kind of a solution before we make this useless split that has to be repeated almost immediately.

One of the things I hate to hear anybody talk about is truncated practices, as Mr. Levin did. As I demonstrated both before this committee and Mr. Celler's committee, had we not had screening we would have had a backlog of over 3,000 cases today of such a nature, with statutory priorities, that some cases literally never could have been heard. Now, I don't believe you are denying justice when three mature conscientious judges conclude that the case isn't going to be aided by oral arguments. I think, too, there is a myth about some of these oral arguments. I make no criticism of the second circuit. They have a practice and are very proud of either affirming or dismissing the cases from the bench, and Mr. Westphal can verify the figures. In my judgment that decision to affirm from the bench is not made as a result of that oral argument.

They must have thought about that before they ever went on the bench. It is a 35 cent subway ride, I guess, from Brooklyn over to Foley Square. It would hardly be fair if we asked a lawyer to come from El Paso to New Orleans and said, "all right, we don't need to hear from your opponent, we will just affirm this from the bench." I think too little has been said about our summary II practice. It requires unanimous decision by three judges to deprive the party of oral argument, and once it is written we can't have any dissents or special concurrences. The one thing I hope never happens at the hands of Congress is to put any kind of prohibition on experimentation. I would hate to see that, merely because in the past you had the luxury of an oral argument in every case, there is nothing in the system that recognizes that that must go on.

I have two or three other comments and then I will turn myself loose if I have any time.

One of the things we want desperately to try is an expanded group of professional staff attorneys. The Chairman will recall that when I appeared here in May of 1972, at page 60 of the S.J. Res. 122 record, I outlined the package (a) and (b) that the Judicial Conference of the United States had approved for the fifth circuit. This provided a third law clerk, a second secretary and a clerical assistant, and eight staff attorneys with a secretarial staff. Well, we have never yet been able to get the substantive legislation. That has finally been introduced. It is now 3 three years later. We managed, through the Appropriations Committee, to get an appropriation to set this thing up on a temporary basis just this past July. It is in its third month of operation, and already it is proving to be of great value to the judges in further increasing our output.

But this committee and the Congress has to take recognition of the fact that adequate steps have to be taken to assure a staff of permanent

professionals to help keep up with this certain prospect of great increases in business.

I think I should say something about the en bancs, because all of us recognize that they are a time-consuming thing in terms of judge power. We all leave here today or tomorrow to return to New Orleans next Monday night to begin en bancs in eight cases that will be heard orally and three cases on briefs, and with 15 judges plus three senior judges, that is a lot of judge time.

But one of the things that our experience demonstrates is that very few of these cases are the result of a conflict as such. Mr. Westphal has looked at my statement prepared for the Revision Committee and in exhibit "F" of my Jacksonville statement there is an analysis I had my law clerks make of all of some 75 cases that we heard en banc. I counted up three that were clear conflicts and five that were possible conflicts. What we have en bancs on are serious problems of the kind that come with the fifth circuit and call for this great intermixture of background, geography, and predilections. We see a slip opinion that arrives at a result that we don't like—or that we doubt that we like—but it is not because it is contrary to some prior decision. For example, I think next week there is only one case that involves a real conflict, a possible conflict. The rest of them are very serious, but new problems on which the Court has not really ruled. So I would predict that the prospect of the proportional number of en bancs is going to be as great in the new eastern circuit as it is in the total circuit.

I have two last little things. One is a kind of—well, I don't know how you will regard this, but I want to be perfectly fair to all my judges—I think we would all like to be known as the fifth circuit, and I think whatever split comes each of us would like to be part of the fifth circuit and let somebody else be a part of the eleventh circuit.

In the Commission's proposals they make the States east of the Mississippi River the fifth circuit, and make us on the western bank of the river, Texas and Louisiana, the eleventh circuit. Well, I would say for the sake of the building, which has chizzled into it the fifth circuit, that from the standpoint of economy, if not from tradition and history, we ought to be called the fifth circuit.

Senator BURDICK. Fifth circuit, west wing?

Judge BROWN. West wing? Well, we now have west, east, and en banc courtrooms.

I think, in the record—Mr. Westphal, if you will check with Mr. Levin, he can verify this—I believe the bar of the Canal Zone, which consists of about 20 lawyers, formally urged that they be attached to the eastern circuit rather than New Orleans. Historically they came to New Orleans because of ocean transportation. Now they have to fly to Miami anyway—to get to New Orleans, they fly to Miami. If that is all you had to decide I don't think we would be here.

I think that is just about all I have to say. As a matter of fact, I don't know whether I have said anything new. If I can offer any further help, I am here.

Senator BURDICK. Well, I want to thank you, Judge Brown. It is not only helpful to have your testimony, but you present it in such a unique way that we are always glad to hear from you.

You accented the need for new procedures, for speedy process, and for the deciding of cases without oral argument. Well, that is precisely

one of the questions I asked of the previous witness. Merely because you are screening them and denying them oral argument, that doesn't necessarily mean you are denying them justice, does it?

Judge BROWN. Not at all, not at all.

Senator BURDICK. I wonder, with all due respect to the members of the bar, if this doesn't, in some cases, have a tendency to reduce unnecessary argument.

Judge BROWN. I think that is a tendency, too. The system has been attacked only in about five or six cases. Denial of cert doesn't mean anything, they say. One of the interesting things is that people ask, "How many cases do you screen out?" We don't screen "out" anything. We screen every case. The figures show that since 1968 we have handled over 8,000 cases. We ask first, does it need oral argument, and, if it doesn't, what are the merits?

Senator BURDICK. If any one judge asks for oral argument, then it is granted?

Judge BROWN. That is right. This is where we are using these new staff attorneys, because they can make a preliminary determination. Then, before the calendar is made up, the decision is that of the presiding judge of the panel. If he differs, thinking this case doesn't deserve oral argument, he can take it off and it goes to a screening panel.

Senator BURDICK. Any other suggestions?

Judge BROWN. Of course, this Rule 21, which is a shortened opinion, and says "affirmed" or "enforced." But in the cases that it is used, I honestly believe that it meets the criteria that an opinion would serve no purpose.

Incidentally, in my statement before the Commission there is an exhibit "F" in which I had my law clerks make an analysis of signed opinions by me in summary calendar cases that are decided without oral argument, those of my fellow panel members, and then a random selection from other judges. You will see the serious character and nature of a lot of these cases. These are not frivolous cases. They may be tax cases. A great number of NLRB cases go off on summary docket. The figures show the wide spectrum of cases disposed of by Summary II's in which there is a denial of oral argument.

Now, one thing that surely the Congress ought to want to encourage is any system that assures a considered judicial judgment by responsible judges and at the same time hastens the day of finality in criminal matters. Criminal cases comprise about 44 percent of our docket which includes States prisoner cases, § 1983's, habeas corpus cases and direct criminal appeals. Approximately 60 percent of the direct criminal appeals go off without oral argument, 90 percent of the habeas corpus cases without oral argument, and 65 or 70 percent of the 2245's. We dispose of 63 percent of those in less than 40 days, and it isn't at all uncommon to get a brief on Monday, the case is sent to a screening judge, and within a period of 10 days' time a per curiam opinion or signed opinion is filed which disposes of the case. That is a desirable thing from the standpoint of justice. It meets society's needs for finality, and it helps the judges dispose of their cases, too.

Senator BURDICK. But there is still the one situation that splitting the circuit would aid, the en banc cases. You will have to concede that it will take less time with the 9 judges than with 15?

Judge BROWN. For the first year that is true. The second we will have about 11.

Senator BURDICK. We don't know that yet.

Judge BROWN. There is one thing certain about the fifth circuit—I have been making these calculations and in every year except 1973, our projections have been under the actual figures. In one of these exhibits that I have offered here and in my two statements to the Congress, I have shown how each year until this year we disposed of more cases than were filed the preceding year. We don't have any doubt—and I don't believe my brothers from east of the Mississippi have any doubt—that we are going to continue to have roughly a 10- to 12-percent increase annually.

Senator BURDICK. Do you have any suggestion about reducing the number of judges who sit en banc?

Judge BROWN. Well, I differ with Judge Wisdom on this. I expressed the view before, Mr. Chairman, that I don't see how you can have a court in which some of the judges don't have a right in making the policy decision on what the policy solution will be. I have difficulty with that concept that gives that role to the nine senior judges. I would oppose that.

Senator BURDICK. Well, it seems to me that when you get 15 judges appearing en banc, it is sort of a duplication of effort or a waste of judge power to tie them all up in one case. They have to come in from great distances. There must be some other alternative.

Judge BROWN. Well, it certainly is a thing that Congress ought to look at. It may be that there is a place for each panel going off on its own. In some circuits that is what used to take place. We try to respect a panel decision and not rule to the contrary. But the price is high in terms of judge time. Without a doubt, it is high.

Senator BURDICK. Mr. Westphal.

Mr. WESTPHAL. Judge, I know we have a serious matter under consideration today because you are wearing the most somber suit I have seen you in in the last seven times I have seen you.

I think you know, Judge, that during the time in which I have been privileged to work for this subcommittee, I have spent a great deal of time considering some of these problems that we have in the Federal judicial system, both at the trial level and at the appellate level. From my background as a trial lawyer for about 20 years, I have sat here and reflected for the past 4 years now on these problems. One thought which has occurred to me is that one of the real strengths of America and the system that we have here—a system which has endured for almost 200 years—has been the fact that the people of this country have always been willing to accept the resolution of disputes between citizen and citizen or between citizen and State when that resolution has been made by the courts of this land, whether State or Federal.

In that perspective, when we reach the day when the bar and the citizenry in this country will not accept as final the decisions made by our courts, then we are in a situation where we will greatly and seriously threaten the stability of the form of government we have had for 200 years. I am concerned about the attitude of the bar, because I do not think the bar adequately appreciates the problems we have. When they express concern about some of the expedencies which have been adopted in order to keep pace with the tremendous

increase in judicial business, I wonder how long it will be before their clients, and in turn many citizens, will share the same concern. I think that is one of the fundamental questions that this subcommittee, the full committee, and the Congress will have to concern themselves with when they go about the process of trying to make a decision on the problems that are involved in these hearings that we are starting today.

Let me ask you, Judge, when did your court receive its tenth and eleventh judges?

Judge BROWN. I wish I could tell you exactly.

Perhaps Judge Wisdom will recall.

Mr. WESTPHAL. Judge Wisdom, do you happen to recall the dates?

Judge WISDOM. I think it was around 1967. I may be wrong.

Mr. WESTPHAL. In any event, we can check.

Judge COLEMAN. In 1966 we went from 9 to 11, and then from 11 to 13 and then from 13 to 15.

Mr. WESTPHAL. In any event, it was some 8 or 9 years ago now?

Judge BROWN. Wait a minute. I can tell you exactly now. Table 1 in the annual clerk's report lists the number of judgeships. I can't be sure of whether these are fiscal years or calendar years, because we kept our records on a calendar year basis, but we had 9 judges in 1965-66, 11 judges in 1966-67, and 13 judges in 1967-68. Then we reached 15 in 1969 or 1970, but we didn't fill the positions until 1970-71.

Mr. WESTPHAL. In any event, since 1966, as far as the fifth circuit is concerned, there has been a departure from this magic number 9 for the number of judges?

Judge BROWN. Yes. Let me say something about that, too. There are many myths in the law, and judges perpetuate them. The District of Columbia Circuit has a number of visiting judges drummed up by Chief Judge Bazelon. He had 16 visiting judges in his court a year ago and I think he has about 25 lined up for this coming year. Our statistics show that, when you have a large number of visiting judges, you have the equivalent of a 12-, 13-, 14-, or 15-judge court. That applies to the second circuit, too.

Mr. WESTPHAL. The same thing has happened in your own circuit. Some years back, when you had visiting judges, these exhibits indicate that you operated with the equivalent of some 19 or 20 judges on your court.

Judge BROWN. Right.

Mr. WESTPHAL. In any event, for some 8 years now the answer to some of these growing caseload problems in the fifth circuit have been for Congress to increase the number of judgeships. As you have reviewed it, that occurred gradually, but finally, in 1971, the appointments were made, and ever since that time you have been accorded 15 judges. Also, in 1971, when you first became a court of 15, the total filings were 3,215. You are still accorded 15 and yet there has been a 1,000 case increase in your caseload. This in turn has reflected itself in the filings per judge figure which have grown from 1971, with 154 per judge, to 1974, when there were 219 per judge. During that same interval, your court, in order to try to keep abreast of this huge increase in business, has tried just about every—what I would term—expediency other

than oral decisions from the bench in order to keep your heads above water.

Judge BROWN. Right.

Mr. WESTPHAL. I agree with Professor Levin and many members of the bar throughout the fifth circuit that you and the members of your court are entitled to a great deal of credit for making this effort; if you had not, things would be in pretty bad shape in your court.

The Chairman asked what methods should be tried, or could be tried, other than those with which we are all familiar, and you referred to Rule 21. You have had Rule 21 in your court ever since 1971. So that really isn't anything new.

Judge BROWN. Rule 21 came along a little later.

Mr. WESTPHAL. But it really isn't anything new and has already had an impact on this overall picture that we see. You also suggested that Congress could possibly authorize staff attorneys or, as you term them, legal assistants, who might have an impact. As we consider that question, we must consider some apprehension on the part of the bar. Some members of the bar feel that use of legal assistants or staff attorneys by a court that has 219 filings per judge is one thing; whereas the use of staff attorneys by a court that has only 124 filings per judge is quite different. Do you agree with that rather simplistic comparison between an overworked circuit and one with an average amount of work insofar as the use of staff?

Judge BROWN. Well, I suppose there is some basis for saying that the more overworked you are or the heavier the burden you face the greater is the hazard that a judge will take things at a slightly more leisurely pace. I want to make a footnote here that this is a powerful factor on a national basis to which, apparently, little attention is paid. With a caseload of 219 per judge for the fifth circuit this past year, many of the other circuits were down to 60, 70, and 80. If we can do this kind of work, why aren't other courts of appeals capable of doing the same sort of thing? And if so, shouldn't that manpower be manipulated physically in such a way that they attack this national burden?

Mr. WESTPHAL. Now, regarding your exhibits 28 through 32, I call your attention first to exhibit 28 which shows the Administrative Office projection and the Judge Brown projections for fiscal year 1974. The actual filings for your court in 1974 were 3,294, which is a little bit less than your projections and still a little bit less than the Administrative Office projections?

Judge BROWN. That is right.

Mr. WESTPHAL. Now, did I understand you to say in response to a question from Senator Burdick that the filings in the district courts had increased 3.3 percent?

Judge BROWN. I took that information from page I-2 of the just released annual report.

Mr. WESTPHAL. I haven't seen that yet. I am looking at a printout which we requested from the Administrative Office computers on case-loads in the district courts in fiscal year 1974, which shows that, in the Nation as a whole, the filings in the trial courts increased only 1.3 percent.

Judge BROWN. Well, on page I-2 the overall civil-criminal filings moved upward by 3.3 percent.

[Editorial note. In reviewing his testimony following the hearings, Judge Brown was able to determine the reasons for this confusion concerning the nationwide percentage increase in district court filings between fiscal year 1973 and fiscal year 1974. He therefore submitted the following supplemental statement for inclusion in this record:]

SUPPLEMENTAL STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, FIFTH CIRCUIT

On editing the oral statement given by me to the Committee on September 24, 1974 for non-substantive corrections, I learned that I had made a substantive error on page 58-59 of the transcript. In response to an earlier question from the Chairman and again by Committee Counsel, I reiterated that, on the information received from my Circuit Executive (who was in attendance with me), nationwide filings in the District Courts had increased 3.3%. This was based on the summary sheet in the just recently published Annual Report of the Director of the Administrative Office. Subsequently, on checking I learned that the nationwide increase in filings was 1.6% and the 3.3% was on pending caseload.

The purpose of this supplemental statement is to supply to the Committee a formal statement which corrects this but at the same time gives significant pertinent information with respect to the Fifth Circuit.

As the possible realignment or split of the Fifth Circuit depends on our localized Fifth Circuit experience, the correction of this inadvertent error has led to a very significant statistic.

I have prepared Brown Table 33 (attached) which reflects that in the District Courts of the Fifth Circuit for the period FY 1970 through FY 1974 that except for Louisiana, all of the States of the Fifth Circuit have shown a substantial increase in business over the last four years. While the filings in the nation as a whole increased 12.5%, the States of the Fifth Circuit have shown a significant increase of 21.9% during the same time.

There is no drop off in the business of the District Courts (civil and criminal) of the Fifth Circuit. There is no likelihood that there will be any. And since the FY 1970-74 figures cover a period when there was no significant increase in District Judgeships, we have to bear in mind that the Judicial Conference of the United States has recommended the creation of 21 new District Judgeships and your Committee has approved creating 11 new Judgeships.

BROWN TABLE 33.—COMPARISON OF TOTAL CIVIL AND CRIMINAL DISTRICT COURT FILINGS BY STATES OF THE 4TH CIRCUIT

FISCAL YEAR 1970-74

	Fiscal year—		Increase or decrease
	1970 ¹	1974 ¹	
Alabama.....	2,516	3,125	24.2
Florida.....	5,240	6,272	19.7
Georgia.....	3,340	4,997	49.0
Louisiana.....	6,212	6,139	-1.2
Mississippi.....	1,249	1,561	25.0
Texas ²	7,893	9,955	26.6
Canal Zone.....	471	759	47.6
Circuit total.....	26,921	32,818	21.9
National total.....	127,280	143,284	12.5

¹ Source: Annual Reports of the Director, Administrative Office of the United States Courts.

² Filings adjusted by reduction for criminal immigration cases due to change in docketing practice in fiscal year 1973.

[EDITORIAL NOTE: The record now resumes reporting actual testimony rendered during the hearings:]

Mr. WESTPHAL. In any event, the district courts are not experiencing the 7 percent annual increase that they were experiencing 3, 4, and 5 years ago?

Judge BROWN. Well, one factor which has been little recognized is that of the exponential rate of increase in appeals over the increase of trials in the trial court.

Mr. WESTPHAL. Of course, these projections on a straight line basis extend from a period of time when filings in the court were increasing at 7 and 8 percent per year and do not recognize, as the chairman has indicated, that for the last 3 years we had a decrease and then an actual leveling off.

Judge BROWN. Well, all I can say is that Judge Wisdom has the exact figures—but that we have had an increase of 10, 11, and 12 percent in district court judgeships in the last 7 or 8 years. Now, I know that there has been a substantial increase year-by-year in the total filings within the fifth circuit district courts.

[EDITORIAL NOTE: In support of Judge Brown's statement see Brown table 33, *supra*, submitted as part of Judge Brown's supplemental statement.]

Mr. WESTPHAL. And as you have indicated, there has been a resulting increase in the rate of appeals.

Judge BROWN. Right.

Mr. WESTPHAL. So, as shown on your Brown table 32, you have projected possible caseloads for the various States in the fifth circuit according to the Commission's second alternative recommendation. According to your exhibit 32, in fiscal year 1977, if there are 2,581 filings in the four eastern States, in order to maintain the 1973 national average of 161 filings per judge you would need 16 judges in the four eastern States?

Judge BROWN. Yes.

Mr. WESTPHAL. And similarly in the two western States plus the Canal Zone?

Judge BROWN. Thirteen judges.

Mr. WESTPHAL. So the fact of the matter is, Judge Brown, that, if no geographical realignment is made whatsoever, the fifth circuit as presently constituted would require by your own projections 29 judges instead of 15 in order to handle its workload in 1977?

Judge BROWN. That is what led me to say that every argument I make keeps coming back to hit me in the face.

Mr. WESTPHAL. This is just the problem that the Commission has had to deal with and that the Congress is now going to have to deal with. No matter how you look at this thing, in the future, instead of dealing with the work product of 15 judges, you are going to have to try to keep 29 judges familiar with what the other 28 are doing. It is going to take increasingly more of the judges' time to figure out what is going in their court and they will have less and less time in which to decide cases.

Judge BROWN. I don't believe anyone seriously feels that we ought to have 29 judges.

Mr. WESTPHAL. According to your exhibit, if the fifth circuit is not realigned, you will have a caseload in 1977 which—at a more manageable level of 161 cases per judge rather than the 219 cases per judge that you have right now—will require your court to have 29 judges to do it. Now, it seems to me that the question facing Congress is whether, in 1977, we want to have a court of 29 judges in the fifth circuit and a court of 22 judges in the ninth circuit or whether there is going to

be some geographical realignment. That is the ultimate question, it seems to me, which the subcommittee and the Congress must decide. There really isn't any other choice, is there?

Judge BROWN. No, there really isn't.

Mr. WESTPHAL. The theory of our system has always been that, through appellate review, the work of the trial courts will be guided by the decisions made by appellate judges.

Judge BROWN. I was pretty hasty in answering. Of course, I expressed a view when I appeared on S.J. Res. 122 that the Senate bill was preferable, but it didn't survive the conference. So that cart is before the horse, because there are a lot of matters that require legislation that could have a very direct bearing upon, not only the caseload as such in a number of appeals, but also in the manner in which they are to be handled. A good illustration is diversity cases, and Congress granting us a certiorari type power. About 12 percent of our cases are diversity cases. That is nearly 400 cases. We could knock those out on just a discretionary review. There are also the social security cases and the like. But here we are about ready to split the circuit, knowing it is to be split again when these decisions have not even begun to be reported by the Commission.

Mr. WESTPHAL. This committee under Senator Burdick's chairmanship has spent some 3 years and some 15 or 16 days of hearings on a bill known as S. 1876 which embodies the proposals of the American Law Institute and which would make some slight change in diversity jurisdiction in the Federal courts. The bar in this country, particularly the ATLA, has proposed no changes whatsoever in diversity jurisdiction. I might note that many Southern lawyers in your own circuit—Lawrence Frank from Mississippi for one—realize that there is merit in some curtailment of diversity jurisdiction. Now, looking at the statistics in your court, in 1973, out of 2,840 terminations, 344 were in personal injury tort cases. I imagine a large number of those are diversity cases, and I imagine some of your contract cases, which numbered 271, may have diversity of citizenship as the basis for jurisdiction. But even if 50 or 60 percent of them could be eliminated were the Congress to pass some curtailment on diversity jurisdiction, you would still be left with some 2,500 cases which you would have had to terminate. Again I submit a caseload of 2,500 may in fact be too much.

With all due respect to those who say that jurisdiction should be curtailed first, before any attempt is made to solve the terrific workload that our system places upon the judges in our courts of appeal, I think we would have the wrong priority there. It will be 1977 before we see whether any of these possible changes have any effect whatsoever, and, as the right hand of Congress takes away some jurisdiction, the left hand of Congress can certainly create more jurisdiction. There is a bill pending right now regarding deep-water ports which would put in Federal courts any cases arising out of the use of those facilities. I am afraid the matter is in a push and shove stage regarding some of these issues we have to deal with.

Judge BROWN. I would say this is the general sort of reaction to that. There could be a more eloquent argument made for the critical necessity of having the Congress look at the need for new methods and new requirements. I just hope nobody freezes out the opportunity

to improvise and experiment. As I told you, our experimentation has been both positive and negative. I told you about our "standing panel" experience that turned out to be wrong and we abandoned it. As you know, in just 4 years of screening we increased the judge output by 104% and simultaneously reduced the median time from notice of appeal to final disposition to make us the third ranking circuit in the Nation. If, on the basis of the experience in 3 months operation of the staff attorneys' office, we can achieve a like increase, we may well show that no split of the circuit is necessary.

Mr. WESTPHAL. Judge, you mentioned earlier in your testimony that one slight criticism of the Hruska Commission's work which you have is that they concentrated on the fifth and ninth circuits only when they should have looked at the country as a whole. I think you will recall that, prior to the hearings at Houston, there were distributed for consideration by all the people interested in this subject some computer printouts, made by either the Federal Judicial Center or the Administrative Office, using variable factors which explored different possibilities of carrying out a realignment from Maine to southern California and from Washington to the tip of Florida. It is my recollection that the Commission did consider that before they concentrated their attention on the three circuits that seemed to have the largest problem in terms of caseload, namely, the second, fifth and the ninth. Do you happen to recall that?

Judge BROWN. Yes, there were, and I made them available to all lawyers before their appearances, so they had some understanding.

Mr. WESTPHAL. Judge, I think your statement here has contributed to the information that the subcommittee will need and will consider.

Mr. Chairman, that is all.

Judge BROWN. Thank you very much. I enjoyed, as always, being here.

Senator BURDICK. We have two judges left, Judge Wisdom and Judge Gewin. Do either of you have a travel problem?

Judge WISDOM. No problem, Senator.

Senator BURDICK. Fine. I will then now enter your prepared statement into this record, Judge Wisdom, and you may proceed to direct whatever summary remarks you may have to the committee.

[Judge Wisdom's prepared statement follows:]

PREPARED STATEMENT OF JUDGE JOHN MINOR WISDOM

Thank you for the opportunity of appearing before this Committee.

I have served on the Court of Appeals for the Fifth Circuit since June 1957, seventeen years. I have no intention of taking senior status.

I am a member of the Council of the American Law Institute, and I served as one of the advisors on the ALI Federal Jurisdiction Study. I mention this, because you should know that I now favor doing away with diversity jurisdiction. It has outlived its usefulness. Elimination of diversity jurisdiction will relieve the Fifth Circuit of about 12 percent of its caseload, or almost 400 filings. In the alternative, I favor the ALI proposals now before Congress limiting diversity jurisdiction. Adoption of these proposals will reduce diversity filings by about 50 percent.

I am a member of the Advisory Council on Appellate Justice (ACAJ), of which Professor Maurice Rosenberg is Chairman. As you know, the Council has developed, with Judge Shirley Hufstедler and Professor Paul Carrington, an ambitious plan for restructuring the federal appellate system, based on a national division of the federal courts of appeals. I mention my membership on this council, because you should know that I oppose its plan to restructure the appel-

late system and I oppose any other radical revision of the federal courts system *until* we put the horse in front of the cart. The federal judicial system needs restructuring and it may need realignment of geographical boundaries—I would enlarge some circuits, for example. But first things first. Before any radical change, such as splitting the Fifth and Ninth Circuits, Congress should deal with the roots of the evil.

The evils are naked to the eye. First, we have too many cases which should not be in the federal courts; jurisdiction must be reduced at both the district and appellate levels. Second, the federal machinery of justice must be improved; the internal practices and procedures of federal courts are inefficient and in the grip of a dead hand. Using a simple screening process to eliminate oral arguments and to shorten opinions, and employing a small central staff, the Fifth Circuit has kept up with its work. In Fiscal Year 1973 we had no backlog. If Congress will furnish funds for an adequate staff, there will be no need to divide the Fifth Circuit—even if, Heaven forbid—the input of cases to federal courts is not curtailed.

The Committee has before it a recommendation far more radical than the ACAJ's proposals. This is the recommendation of the Commission for Revision of the Federal Court Appellate System that the Fifth and Ninth Circuit Courts be divided. This is a dangerous step toward proliferation of circuits that may not destroy but will certainly weaken the historic role of the federal courts in American Federalism.

A federal circuit court has a federalizing function as well as a purely appellate function of reviewing errors. Federal courts are more than courts which settle private disputes over contracts and torts. The federal courts' destined role is to bring local policy in line with the Constitution and national policy. Within the framework of "cases and controversies" and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the states and private citizens asserting federally created or federally protected rights. The United States Supreme Court cannot do it all. When the Supreme Court acts, inferior courts must carry out the Court's decision. It is up to us to put flesh on the bare bones of such broad mandates as the requirement that schools desegregate with "all deliberate speed." A court composed of judges chosen from six states is better insulated from parochial prides and prejudices than a court composed of judges from a small number of states. The Court of Appeals for the Fifth Circuit is truly a federal court. I question whether a court composed of judges from only Louisiana and Texas would be able to perform its federalizing function as well as the Fifth Circuit.

The Commission's basic assumption is that a court should not have more than nine members. Accepting that assumption and pursuing its consequences to their logical conclusion, the country is in for a rude shock. Manhattan and Southern California should each have its own circuit, as soon as the additional needed district judges are appointed and start generating appeals.

My esteemed colleagues who want to see the Fifth Circuit divided are in for a ruder shock. Before the Commission, they agreed that: "It should be emphasized that any circuit realignment should result in a Federal Appellate System which will suffice without further realignment for a *period in excess of 25 years*."

In fiscal year 1973 the Fifth Circuit had 15 active judges handling a total of 2964 filings, 198 filings a judge, as compared with the national average caseload of 161. (Without the Fifth and Ninth Circuits the national average would be 141). If the Commission's plan were in effect in *this fiscal year*, 1974, there would be two courts of nine judges each, handling a total caseload for both courts of 3294 filings or 183 filings per judge. These are hard figures from the Administrative Office. Accepting the Administrative Office's projects, as early as fiscal year 1977, we would have total filings of 4340 (our clerks estimates 4660); 2184 for a circuit composed of Florida, Georgia, and Alabama, or 243 filings per judge; 2156 for a circuit of Texas, Louisiana, and Mississippi, or 239 filings per judge.

In other words, the assumed relief afforded by having three additional judges (for the proposed two courts), a 20 percent increase in judgepower, will have disappeared before the two courts can come into being, because the filings will increase by more than 20 percent.

Consider the pressing need for additional district judges in our circuit. The Fifth Circuit received 13 additional district judges in 1962, 14 in 1966, and 18 in 1970, or about a 25 percent increase every four years, from 1962 to 1970. The Judicial Conference of the United States recently approved 20 additional judges

for the Fifth Circuit. The Judiciary Committee of the Senate cut down this number to 11 additional district judges. Accepting this latter figure, the 11 newly appointed judges will generate appeals about equal in number to 15 percent of the appeals now generated by our 74 district judges. To the overall estimate of district court filings must be added an historic growth factor of 7 percent. The appeals generated just by the 11 new district judges to be appointed, plus the 7 percent normal growth factor, will further increase the workload by 22 percent, producing 750 more cases by fiscal years 1975-76.

I am well aware that, under Public Law 92-489 (1972), the Commission's first duty was to study and report its recommendations for changes in the geographical boundaries of the circuits. But that direction is qualified in the statute by the requirement that the changes be "appropriate for the expeditious and effective disposition of judicial business". If I may say so, without being presumptuous, I suggest that this Sub-Committee on Improvements in Judicial Machinery could take the position that its studies demonstrate that the temporary relief afforded by the division of the Fifth and Ninth Circuits is either non-existent or so insubstantial as not to justify the radical measure the Commission recommends.

Senator Burdick put his finger on the problem on June 21, 1971, when he introduced Senate Joint Resolution 122: "A joint resolution to create a Commission on Revision of the Federal Court Appellate System of the United States." On the floor of the Senate, he delivered a clear warning of the inadequacies of realignment:

While it is apparent that a solution, other than pure manpower increases must be found, there is respectable opinion that realignment of the circuits, involving redistribution of the caseload to courts of appeals having new delineations of territorial jurisdiction would be only a temporary solution. The benefits of such a realignment may last only until the caseload increases to a point beyond the capacity of the revised courts. Legal scholars in recent years have suggested that a relatively permanent solution to the problems of increased appellate caseload can be found only if the appellate court system itself is redesigned or restructured.

Since appeals caused by normal growth and appeals generated by newly appointed district judges exceed the new capacity provided by three additional judges to the proposed new circuits, in the language of Senator Burdick, there will be no benefits of realignment; the caseload is beyond the capacity of the revised courts.

There is no time to waste.

First, the flow of cases to the federal courts must be reduced.

I agree almost completely with Judge Friendly's recommendations. On the subject of federal courts, and a lot of other subjects, for that matter, there is no better informed person in the country than Henry Friendly. I shall not try to improve on what he has well said in his book and in his statements to the Commission and to this Committee.

The Freund Committee, Federal Judicial Center Study Group on Caseload of the Supreme Court has come up with an imaginative, innovative suggestion that has a great potential for reducing the caseload of "criminal cases". I include in the term, collateral attacks on convictions and prisoners' complaints of mistreatment in prison. The Committee has suggested "The establishment by statute of a non-judicial body whose members would investigate and report on complaints of prisoners, both collateral attacks on convictions and complaints of mistreatment in prison. Recourse to this procedure would be available to prisoners before filing a petition in a federal court, and to the federal judges with whom petitions were filed".

Habeas, 2255 cases and prisoners' complaints constituted 22.9 percent of appeals docketed in fiscal year 1973. With the direct criminal appeals (24.4), they are—to put it mildly—the most insubstantial appeals before our Court and all federal courts. Yet a few have merit and are of great constitutional importance. And in every case the prisoner should have the belief that his rights and his wants are not neglected in our system of justice. The Freund Committee's suggestion for an ombudsman approach for dealing with groups of appeals, many meritless and vexatious, would be in the interest of society as well as in the interest of conserving judge-time. I would hope that the Commission would explore this subject, propose legislation to Congress, and urge prison authorities not to wait for legislative approval but to act now by establishing grievance procedures. (I understand that in some prisons this has been done.)

Our federal judicial system creaks. Thought should be given to establishing writ (discretionary) jurisdiction in the courts of appeals in certain categories of cases—in diversity cases, for example, if diversity jurisdiction is not abandoned.

Applications for rehearing should be severely restricted, if not done away with.

En banc proceedings need reexamination. The importance of a case should not be one of the criteria for granting an en banc hearing. If the case is really of great public importance, an en banc hearing simply delays final action by the Supreme Court. If all that is needed is a resolution of a conflict between two panels, there is no good reason why that act of resolution should not be performed by a third panel or a panel of five judges.

One of the most significant contributions this Committee or the Commission could make would be to endorse screening as a necessary and proper business practice to improve the efficient operation of the courts. If we had had no screening, we would today have a backlog of 3000 cases. On Administrative Office figures, we would need a complement of 31 judges. An appeal would take three-and-a-half years to be heard; but no civil cases could be heard, because the criminal cases would occupy the full Hearing Calendar. It is significant that only 40 per cent of the civil cases are classified as Summary II's. It is also significant that we have reduced the use of visiting judges and senior judges by 60 per cent. I have found that Fifth Circuit lawyers are unhappy when a visiting judge or even a district judge from this circuit is a member of the panel; we are proud of our senior judges and so are the lawyers in this circuit.

The essential ingredient of effective screening is a central staff supervised by a permanent, well-paid, competent lawyer, working with adequately trained junior lawyers or good law clerks. Such a staff would be institutional in character as distinguished from a judge's own individual law clerks. These soon take on the coloration of "their" judge. Professor Dan Meador has made detailed studies showing the benefits of a central staff.

Assume (1) even a modest growth in population, commerce, and industry, (2) even a conservative estimate of an increase in federal question cases, and (3) even the appointment of only eleven district judges to the area now comprising the Fifth Circuit. *In one tenth of a generation* the relief will have vanished and, on the basis of the Commission's rationale for dividing the Fifth Circuit, the new Fifth Circuit and the proposed Eleventh Circuit should be partitioned, further proliferating the circuits. Judge Thomas Gibbs Gee's remarks in his letter to Professor Levin of December 20, 1973, are worth repeating:

I submit that to dismember a proud and effective institution such as the Fifth Circuit as a preliminary measure and in pursuit of benefits which can only be short-haul, when it is obvious that other and far-reaching changes of a basic nature are going to be necessary, would be unwise. Who knows that the necessary long-range changes which plainly must come might not render such an action even unnecessary?

If I may employ a homely metaphor, you have a good horse that is getting the wagon up the hill now. I do not think we should exchange him for two ponies, when it is plain that, by the time we have them in harness, we may be dealing with different wagons and different hills.

I respectfully suggest that division of the Fifth Circuit will create a dangerous illusion of temporary relief that will delay effective reformation of the federal courts system.

As Madison clearly foresaw, the central principle that makes the American system workable is federal legal supremacy. This principle preserves national policy against conflicting local policy, protects the individual's constitutional rights against governmental abuses of both the nation and the states, and safeguards basic political principles of American federalism. As federal question litigation has increased, the circuit courts have become more and more important. Their relative insulation against local prejudices, as compared with district judges and state courts closer to the fire, has enabled them to fulfill their destined, if friction-making, exacerbating role. In recent years the federal circuit system has proved workable in trying situations. I hope, indeed, I know, that this Committee will think long and hard and exhaust all reasonable alternatives before it takes a step that may lead to such proliferation of the circuits as to undermine the principle of federal legal supremacy.

**STATEMENT OF JUDGE JOHN MINOR WISDOM, FIFTH CIRCUIT,
NEW ORLEANS, LA.**

Judge WISDOM. Thank you for the opportunity of appearing before this committee. My name is John Wisdom. I have been on the Court of Appeals for the Fifth Circuit for 17 years. I have served on the multi-district litigation panel since its inception in 1968, so I am not unacquainted with innovative judicial efficiencies. I am a member of the council of the American Law Institute and was one of the advisers on the advisory committee on the American Law Institute jurisdiction study. I mention that fact because I am in favor now of doing away with diversity jurisdiction: in the alternative, I favor adoption of the American Law Institute proposals now before Congress.

I have previously submitted a statement to the committee; so I shall try to be brief.

I have three points. The first is one that has guided me in my previous statements to the Hraska Commission, and in all matters affecting the circuit: That is the necessity for preserving the federalizing function of Federal courts. I am in deathly fear that division of the fifth circuit will dilute the federalizing function, because it will reduce the number of States which furnish the base for selection of circuit judges. The figures that Mr. Westphal alluded to a moment ago, which are figures that I have used myself, are figures that show we are in grave danger of having our federal system diluted, if not destroyed, by proliferation of the circuits. We require 29 judges only if there are no changes in either jurisdiction or court management. Without these changes, even if you divide the circuit into 2 courts of 9 judges each, in no time at all this area will require 29 judges. I am not ashamed to be in the minority of our court on this point, because I have got James Madison sitting with me and he is worth a legion of judges.

My second point is that division of the circuit will not accomplish the objective of reducing our caseload. Judge Brown has talked at some length on this point and each of us has submitted a statement. I have a few figures which he has not used but which bring this out clearly. That is the caseload per judge.

If we use the 1973 figures—those were the figures that the Hraska Commission used for its study—the national average caseload per judge at that time was 161, but that 161 average included figures from the ninth and the fifth circuits. If you exclude the ninth and the fifth, the national average was 141. Now, in 1974 the caseload per judge, which is the year just past, was 198. Assuming that we do not divide the fifth, the caseload per judge will be 222 in fiscal year 1975. If we divide the fifth circuit, by 1977 the caseload per judge of each new court of nine will be approximately 240 per judge. Now, this indicates that you can not go by the numbers here.

But we are not as overworked as it would appear.

The English Court of Appeals, Criminal Division, which is a court of last resort—except for the few cases that manage to go to the House of Lords—in 1969 to 1970 handled a caseload of almost 10,000 criminal appeals. They used what we would call screening. They screened out of the appellate process 73 percent of those cases with-

out oral argument or briefs. We can do the same thing with the proper management of our court.

My second point is that the Hruska Commission has really performed no service in recommending division of the fifth circuit. I say this with great respect for the Commission. Division will not accomplish the objective of bringing even temporary relief, because the year after next or the year after that each judge will have the same caseload then as now and in the meantime we will have taken the irreversible step of dividing the fifth circuit leading perhaps to further proliferation of circuits.

My third point is that, before we commit such an irreversible step, feasible alternatives should be taken. We have not reached the root of the evil and we will never get there until we curtail the input. I realize the difficulties there. I can see what has happened to the three-judge court bill, although everyone familiar with the situation knows that three-judge courts have outlived their usefulness. More importantly, diversity jurisdiction has outlived its usefulness.

Not only should we curtail jurisdiction, we should improve court management. Improving management requires that we dispense with oral argument in a large number of cases. We had no oral argument in 55 percent of our cases last year. Efficient court management also means a central staff. This we are just now instituting, although we tried to have it instituted some years ago. That is the way the British take care of their large caseload. Michigan and California take care of their large caseloads with an efficient central staff supervised by an experienced lawyer with junior lawyers and supervised law clerks.

I have developed these points at greater length in my written statements to this committee and to the Commission.

We must at all costs avoid diluting the federalizing function of the Federal courts.

The pursuit of temporary relief will not succeed, next year or the year after next, certainly not by 1977. In this connection I should like to call to your attention that one reason there is some leveling off, at least in appeals, is because there have been no district judgeships created. But the Judicial Conference recommended 20 district judges for our circuit. This was cut down by the Judiciary Committee to 11. We estimate that each new district judge will generate 40 appeals. If you take the 440 appeals that will be generated by the absolutely needed district judges and add those to the appeals attributable to normal growth plus the increase in Federal question cases that we are bound to have, you will unquestionably see that all of this time spent in realigning the circuits is wasted time until we get to the roots of the evil. The roots of the evil are (1) the input of cases in Federal courts which don't belong there and (2) inefficient management of the appellate process.

Of course, a great deal of thought has gone into plans of one kind or another. I am also a member of the Advisory Council on Appellate Justice. I oppose restructuring of our appellate courts—you are familiar with the various proposals, I know—until we attempt the lesser alternatives: reduction of input and improvement in court management.

I should like to call to your attention that, until this last year, the fifth circuit has never had a backlog. We have been able to handle our

work through screening and with a small staff of pro se clerks. No one can tell just how effective a full central staff, well organized, would be in reducing our burdens. I believe that we are not being overworked, that we can handle our workload without dividing the circuit, and that we can at the same time preserve the federalizing function of the Federal court system.

I should like to say a word on en banc. There is no reason in the world why we should have an en banc court of 15. If the cause for putting a case en banc is a conflict within the circuit, that can be disposed of by another panel that is not composed of members who sat on the conflicting panels, or it could be disposed of by an en banc court of five. Of course, that would take legislation. The British use a court en banc of 5 and they, too, have a full court of 15, plus trial judges to draw on, in their court of appeals, criminal division.

One of the criteria we have been using for putting a case en banc is the importance of the case. I believe that this is a serious mistake. If the case is very important, by putting it en banc we simply delay its getting to the Supreme Court, possibly by as much as 8 months to a year. The importance of a case should no longer be used as a criterion for hearing cases en banc.

I feel that the burdens of en banc hearings are greatly exaggerated. Certainly the fifth circuit should not be divided because of 10 or 15 extra cases that are heard en banc. If we must have en banc hearings to settle intracircuit conflicts, I would suggest legislation allowing three judges, neutral judges, or a panel of five chosen at random, to settle intracircuit conflicts.

I am picking up points that came out in the previous testimony because you have, for what it is worth, a statement I prepared.

Let's talk a little about oral argument. The Louisiana Bar Association has adopted a resolution asking that the fifth circuit not be divided. So we do have a statement of one State bar association in our circuit asking that the circuit not be divided.

I, too, favor realignment of the circuits, however, in spite of all I have said, because I think that some circuits have too small a caseload or cover too small an area. A thorough study should be made of the feasibility of a complete realignment of the circuits rather than selecting the fifth circuit and the ninth circuit for division.

I have so much material here I hardly know where to start. Just ask me questions, if you wish.

Senator BURDICK. Well, Judge, that has been a very good statement, a great contribution. I can't find much fault in finding procedures that will take care of many of these chores. That is the reason we passed the magistrates bill, to help the districts. If we give you more help, then you can turn out more work. That is fine with this chairman.

Judge WISDOM. I think we can do our work, and we don't need to have the circuit divided. That is my view.

Senator BURDICK. But we have a different opinion.

Judge WISDOM. I know, but I have James Madison on my side.

Senator BURDICK. I would be interested in having you give us the mechanics on how your en banc panel of five should be selected.

Judge WISDOM. It should be selected at random from the judges who are not on either of the two panels which were in conflict, or you

can have just another panel decide. As Judge Brown pointed out, we have only 3 of the 28 en banc cases which will be heard to resolve conflicts. He analyzed those cases and there are only three cases involving internal conflicts. The other cases, therefore, involve issues which are of such importance that in accordance with present criteria they should be decided en banc. If they are of such importance, let's not delay their progress to the Supreme Court.

Senator BURDICK. Even 3 cases, when you draw upon 29——

Judge WISDOM. I want another panel to decide the conflicts or a court of five.

Senator BURDICK. Are you recommending that we supply some more clerks here and defer this for awhile?

Judge WISDOM. Yes, I am. Some years ago I proposed a central staff to our court, and the court thought well of it. We had an interview—we tried to get an interview with the Chief Justice, but some conflict came up and we spoke with Mr. Rowland Kirks. Now, however, we are well on the way to a central staff, but not the kind of central staff that I think we should provide, not the kind that Michigan and California have or that the English have. We need a well-paid person, a job paying enough to attract a good man, an experienced lawyer, with a permanent staff. There are reasons for that. Then, we'll have more of an institutional staff. A judge's personal law clerk tends to take on the judge's own coloration; the clerk has learned your legal philosophy and predilections, and his point of view may be quite different from that of an institutionalized staff.

We now have two law clerks, with the option of having a second secretary or a third law clerk at a second secretary's salary. And we have begun to set up a central staff.

Senator BURDICK. Is there danger of one of these more qualified clerks with the good salary becoming a circuit judge himself?

Judge WISDOM. This is the argument that is always used against it, as you know. The answer to the argument is that the determination of every case is always in court. This is where our own law clerks can help us, to insure that the central law staff is not arrogating to itself judicial responsibilities. Every decision we make now is by a full panel of the court.

That brings up another question—I hope you will excuse me if I seem to go off on a tangent in answer to your question.

Not enough has been made of the fact that by using the screening process, and by using a central staff to help us screen, we can devote more time to the really meritorious cases. We are getting extremely difficult cases in new fields: consumer protection and environmental protection, for example. We will have with us, always, civil rights, only now they are in a different form. Now it is a question of women's rights or employment discrimination. We have more time for these cases—well, just looking around, I can see judges who have been writing longer opinions than they used to write—and it is good because they explain their decisions better and they have more time to devote to these difficult cases.

Senator BURDICK. I think you have another argument going for your point of view in that you are now feeling the experiences of the district courts 2 or 3 years ago. If the Administrative Office knows what it is

talking about, this thing has leveled off in the district courts and it might level off in your court, too. There is always a timelag.

Judge WISDOM. That is right.

One thing that you could do—and here we have to give credit to the Freund committee for this—I think the Freund committee came up with a great, great idea, and that was the idea of an administrative agency in the prison, accessible to prisoners. Such an agency would investigate habeas cases, 2255's, and prisoners' complaints before the filing stage. Then we wouldn't have cases involving some warden or guard taking seven cigarettes from a prisoner and the case going up to the court of appeals twice. We wouldn't have those cases. That kind of administrative agency would greatly help us. Forty-five percent of our appeals are criminal in nature (due-at appeals, habeas cases, 2255's). An ombudsman type of agency could make an enormous contribution. Not enough attention has been paid to this. I am very hopeful, because the Commission is loaded with brains. I am very hopeful that the Commission will go into these things and come up with constructive suggestions for improvements in procedures and operations. The notion of geographical realignment is like following a will o' the wisp, it leads you nowhere except into a morass.

Senator BURDICK. You don't think that the circuits, as they are presently constituted, are created by divine wish?

Judge WISDOM. Oh, I certainly don't. That is why I would favor a thorough study and a realignment that would provide better balanced circuits. If it were possible, of course it isn't possible, but if we could combine Maine and California that might be a good thing, too.

Senator BURDICK. Pretty bad in en banc, though.

Judge WISDOM. I guess so; I guess it is.

Senator BURDICK. Staff would like to ask a question.

Mr. WESTPAHL. Judge, I thought that the main objective of the so-called Hruska Commission was to try to figure out how we could employ more manpower to handle the judicial business of the courts of appeals. Now, that manpower can be judge power, or it can be staff attorney power, or it can be law clerk power. As you explore just what kind of a mix of these three types of power you are going to concentrate on a given load in judicial business, you get into certain practical problems and certain philosophical problems that I know perplexed the Commission, judges, and members of the trial bar.

The chairman of this committee—being aware of the fact that a number of the circuits were experimenting in one way or another with the use of staff attorneys—really law clerks—was, along with other Senators, instrumental in getting authorization for one law clerk to be paid up to \$30,000 in each circuit. I think that this experimentation is going to result in different constructive uses of staff attorneys in many of the circuits—Judge Kaufman has an interesting innovation he has told us about on settlement procedures—and all of us will thereby learn what is good and what is bad about the staff-attorney or legal-assistant concept as it is applied by the circuit courts.

Now, as a staff attorney to this subcommittee, I certainly cannot quarrel very much with the argument that men such as judges and Senators, who have difficult decisions to make, are entitled to an adequate and competent staff to assist them. But, as staff attorney for this subcommittee, I have no power—and I never exercise any—to make

decisions on policy. I have no vote, and it takes a majority of votes to make decisions on this subcommittee, but I do have adequate access to the time of the chairman of this subcommittee—and to the time of the other Senators who are on this subcommittee—so that they can closely guide and supervise whatever work I do on behalf of this subcommittee.

Using that as a point of reference, and considering the fact that each circuit judge has three law clerks—you do have three, do you not?

Judge WISDOM. Well, on the fifth circuit we were offered the option of a second secretary or a third law clerk at a secretary's salary. That means I have two law clerks at a law clerk's salary and a third boy willing to work for me at grade 7 instead of grade 11.

Mr. WESTPHAL. The fact of the matter is you do have three law clerks?

Judge WISDOM. The fact of the matter is that I have three clerks, but I would like to have the third one upgraded, and so would everyone who is in my fix.

Mr. WESTPHAL. Let's assume, whatever the appropriation or the authorization problems are, that you are of the opinion that each judge on your circuit should have three law clerks?

Judge WISDOM. That is my opinion.

Mr. WESTPHAL. Now, this legal-assistant theory—the staff-attorney theory—espoused by yourself and Judge Brown—

Judge WISDOM. May I interrupt you to suggest that Prof. Dan Meador has written a book on that which has just been published, and he has cogent arguments in favor of a central staff.

Mr. WESTPHAL. Now, then, as I recall the concept Judge Brown explained to us in connection with the hearings on Senate Joint Resolution 122, the concept was to have a “senior” staff attorney at a salary of about \$25,000 per year—

Judge WISDOM. Thirty.

Mr. WESTPHAL. I think the Senate recently authorized \$30,000 a year, which is a little more consistent with inflation.

Judge WISDOM. My figure was \$30,000. He may have had \$25,000.

Mr. WESTPHAL. But the concept was to have some four or five attorneys at salaries of \$15,000 a year—and I suppose that figure has to be adjusted—but to have a staff of about six attorneys, structured somewhere along the lines that I just suggested to you, and have them perform work along the lines suggested by Professor Meador as a result of the experiments which he has been conducting in Virginia, Illinois, Michigan, and one other State that escapes me—

Judge WISDOM. I think California, but in addition there is the Court of Military Appeals.

Mr. WESTPHAL. Right, but the question that comes to my mind is this: Who among your 15 judges is going to be able to give to those staff attorneys the amount of time that my chairman is able to give to me, in order to guide my efforts, so that we are assured that the decisions that are being made are being made by appellate judges who have considered the facts and studied the legal issues and have, most importantly, put their judgment, experience, wisdom, and commonsense to work on the resolution of a legal problem? That is what troubles me, because—I will just make one more statement and then

you can respond—what I have suggested in my prior question to Judge Brown is this: If a court has to deal with the number of filings that we have been looking at here—and incidentally, if nothing is done in the fifth circuit, and we reach a level of 4,660 filings in 1977, and still have only 15 judges, we will then have a caseload of over 310 filings per judge, which, in my humble opinion, is about double what we should expect a judge to handle—but even if a judge only has to handle a caseload of 219, he can only do it with the help he gets from staff attorneys. Now, as I understand the Meador experiment and the system employed in California, the staff attorneys write a legal memorandum analyzing the law involved as applied to the facts involved and attach to it a proposed memorandum decision of the court. What concerns me is: Do we run the risk that when that system is employed in a court with a heavy caseload, we are virtually inviting the judges of that court to just rubberstamp the opinions or the work product of the staff attorneys? How are we going to get the mature judgments and reflections of the appellate judges if they are just passing on the staff work?

Judge WISDOM. I think I can answer that question in this way, and I quote Ehrlich on this: "In the final analysis, justice depends on the personality of the judge." If you get a high enough caliber of judges, the judges can control the staff and there will be no rubber-stamping. But it depends on the judge; he must recognize his responsibilities and live up to them. This may seem to be a loose generalization, but it is true. That is one reason why we desperately need pay raises for judges, too. I want to bring that into the discussion here—and I am not now thinking of myself, because I am too old. I really ought to retire. I am not going to, but I ought to. But I do want to bring that in here because we are not going to attract judges who will live up to Ehrlich's concept of the personality of the judge being the final residual guarantee of justice, if their salaries are based on a 1968 price level. Ultimately that is how this must be done. The way we are now functioning now is to lay out policies and procedures along the lines you have described. We do not have a highly paid supervisor. We have a former law clerk to Judge Ainsworth who is supervising new law clerks. But I believe if we had a man, say, like the Registrar of the British Court of Appeal or like the top man in California—if we had a competent man, he himself would see that the procedures are followed. He will not be able to go around our circuit and spend time with each judge, I admit that. There is that danger, but there is a risk attached to everything. There is a risk in the second circuit that they are not paying enough attention to the briefs. There are risks in almost every form of procedure that is used by the courts.

There is a risk that the district court doesn't decide the case properly. It took Gideon 90 applications for writs.

Mr. WESTPHAL. Under the current classification procedures and screening procedures in the fifth circuit, where you have classes I, II, III, and IV, that screening and classification is made by a screening committee of judges, is that right?

Judge WISDOM. The central staff is helping us there, and it can and is, I think, giving us a good deal of help in that it furnishes a memorandum and recommendation. Sometimes we follow the recommenda-

tions, sometimes not, but the control never leaves the panel to which the case is assigned.

Mr. WESTPHAL. In fiscal year 1973 there were almost 1,100 cases that were classified as "summary II's"?

Judge WISDOM. Yes.

Mr. WESTPHAL. And virtually no class I's, so-called frivolous cases, lacking completely in merit?

Judge WISDOM. There were a few.

Mr. WESTPHAL. So what we are talking about is the staff assisting the judges in your court in handling these class II cases?

Judge WISDOM. Right.

Mr. WESTPHAL. Now, in fiscal year 1973 the 15 judges of your court considered those 1,100 cases, which means that each judge participated on an average, in one way or another, in 219 such cases?

Judge WISDOM. Right.

Senator BURDICK. Well, you certainly can't give that entire workload of 1,100 cases to 5 or 6 staff attorneys, can you?

Judge WISDOM. No, you cannot, that is why we need a larger staff. We have, right now, however, a staff of three handling pro se matters and four handling other matters.

Senator BURDICK. Judge, I have to go to the Chamber and vote in about 3 minutes. Unless you object, I will step down from the bench right now, but let staff continue.

Judge WISDOM. No objection, Senator.

Senator BURDICK. After which we will be in recess until 1:30.

Judge WISDOM. Very good, fine.

I just want to thank you again for the opportunity to testify.

Senator BURDICK. Thank you, Judge.

Mr. WESTPHAL. Now, if you had 11 staff attorneys, and if they processed all class II's, they would have about 100 class II cases for each staff attorney, and I suppose, in order to handle a load of, on the average, 100 cases each, they in turn would be wanting some law clerks?

Judge WISDOM. Well, they are, of course, law clerks.

They are all lawyers. I would add a parenthesis here to throw some light on it. They do not have the job of working on the III's and IV's, and there is quite a difference between writing a memorandum on a simple II and working on a III or a IV.

Mr. WESTPHAL. Some of the members of the bar are of the opinion that some of the cases put into the class II category are not really so-called simple cases, but that they are cases that should have been accorded oral argument under a class III or IV designation. How do we satisfy the members of the bar on this point if you have a staff of 7 or 8 or 11 of these experienced staff attorneys who are handling class II's?

Judge WISDOM. Only by satisfying the bar that the ultimate responsibility lies in the panel to which the case is assigned. I think we should be able to satisfy the lawyers. We satisfied the Louisiana State Bar Association. Also, I don't find that there is nearly as much criticism as some proponents of division say that there is—at least that has not been my experience. Most of the criticism comes from plaintiffs' attorneys, some of whom, of course, are very fine lawyers; but a good many are not fine lawyers. There are some plaintiffs' attorneys who are looking for a fee for the oral argument. I think we should consider the liti-

gants in this matter. It is greatly to the advantage of a litigant not to have to pay travelling expenses for an attorney to argue a hopeless case and not to have to pay his fees for arguing such a case.

Mr. WESTPHAL. Well, if the decision that the case is so hopeless that it cannot be aided by oral argument is made by three judges sitting on a panel, that is one thing; but if that decision is made by some of these staff attorneys, that is altogether another thing.

Judge WISDOM. I believe that every class II case is decided by the panel. We do not rubberstamp them.

Mr. WESTPHAL. Now, on this matter of the assistance of so-called "central staff" in handling these cases, under the Meador experiment and the system as employed in California, the staff attorney, in addition to preparing this rather comprehensive memorandum on the facts and legal issues involved, also prepares a proposed, or a tentative, memorandum or per curiam opinion of some kind?

Judge WISDOM. Right.

Mr. WESTPHAL. Now, I can appreciate the fact that, if we are going to have a well-paid and knowledgeable lawyer go to the trouble of studying the briefs and records in that case and preparing such a memorandum, then it would take just a little bit more of his time to have him draft a proposed memorandum or per curiam decision. But in doing so we encourage the judges to—I don't want to use the word "rubberstamp"—but we encourage the judge to accept his end work-product without spending too much time in the deliberating process which he would have to go through if the staff attorney hadn't already prepared a proposed memorandum order that disposes of the case. You or I, as a judge sitting on the same panel, might say, "Gentlemen, that looks pretty good to me; it reads pretty good." But if we do that without taking the time to get back in there and think about it—and particularly if we do that under a procedure where we do not sit down at a conference table to argue our different points of view—do you think the bar would accept it?

Judge WISDOM. I think you are positing a case that isn't happening now and I hope would not happen. I think that each of our judges is responsible. They look into the class II's, and they don't simply accept memorandums from the staff attorney. That is a benefit, too, of having individual law clerks that can help with the necessary research.

But we will have difficulties, no matter how the circuit is set off, realligned or what reforms should be instituted, because of judges living in different cities. With the possible exception of the judges in the second circuit who live in New York City, after the first conference you have to confer again by telephone or by letter. That is going to take place in every circuit, with the possible exception of the second, and it takes place in the second, too, with respect to those judges who are not from New York.

Mr. WESTPHAL. Well, in the sixth circuit they employ a procedure on some of their screening panels whereby members of a panel physically meet and confer on all the matters that have been scheduled for their determination on that day; they physically sit around the conference table and discuss it, whereas in the eighth circuit it is all done by mail.

Judge WISDOM. The trouble with the sixth circuit method is that the cases are actually calendared, and then half of them go off the calendar as a result of their meeting in conference. The same purpose could be accomplished without their meeting—unless you attach undue value to the conference, which I think is an overvalue in the class II cases. In the class II cases it is not necessary to have an eyeball conference, in my opinion, in most cases.

Mr. WESTPHAL. Judge, in your opinion, can improvement or relief be obtained from the employment of staff attorneys alone, considering the projected increase in business for the fifth circuit, without some curtailment of the input as you have suggested, or must both of those things occur in order to give that relief which would permit the fifth circuit, with 15 judges, to handle the caseload of the next 5 years?

Judge WISDOM. Well, I would hope that both would go on simultaneously. But we don't know what our experience will show as to the benefits of a central staff. We won't know that until the end of fiscal year 1975. But certainly the circuit should not be divided before fiscal year 1975. I don't think there is any possibility of that, either. So we will be in a better position to testify as to the advantages of a central staff, say, in June or July of 1975. But certainly there are some reductions on the input that can be made at this time. I recommend very highly the idea of an administrative agency within the prisons. It seems to me that Congress should—and I don't mean to be presumptuous—but I would hope differences would be resolved on the abolition of three-judge courts. They are certainly wasteful, and there are other reforms that could be made.

Mr. WESTPHAL. I think that completes my questions. Unless you have something more to offer, Judge Wisdom, pursuant to the previous order of the chairman we will stand in recess until 1:30.

Judge WISDOM. I just wanted to say I would like to be able to submit a supplemental statement if that is within the rules.

Mr. WESTPHAL. That will be fine. We will keep the record open and permit you to do that.

[Judge Wisdom's supplemental statement follows:]

SUPPLEMENTAL STATEMENT OF JUDGE JOHN MINOR WISDOM, FIFTH CIRCUIT

With deference to the Hruska Commission, I take exception to its bestowing upon Circuit X of Plan A the title, "Fifth Circuit". Circuit X includes Alabama, Florida, and Georgia.

I am proud of the history of the Court of Appeals for the Fifth Circuit and the body of law our Court has developed. I am sure that all my brothers take equal pride in our Court; each of us regards with repugnance the thought of changing the name of the court on which he serves from the "Fifth Circuit" to the "Eleventh Circuit".

The Commission apparently assumes that starting with the First Circuit and continuing down the eastern seaboard, it would be logical for a Fifth Circuit of Alabama, Florida, and Georgia to be adjacent to the Fourth and Sixth Circuits. The proximity of these states to the Fourth and Fifth Circuits is an inconsequential irrelevance. The Sixth Circuit is adjacent to the Third Circuit. The Ninth Circuit is not adjacent to the Eighth Circuit and is west of the Tenth Circuit.

The significant historical fact which the Commission overlooked or ignored is that from the time when the memory of man runneth not to the contrary New Orleans has been the headquarters of the Fifth Circuit. The present Circuit was constituted by the Act of July 23, 1866 (ch. CCX, 14 Stat. 209). The office of the Clerk of the Court of Appeals for the Fifth Circuit and the circuit library

have always been in New Orleans. The Act of March 3, 1891 (ch. 517, 26 Stat. 837) provided that "A term shall be held annually . . . in the fifth circuit, in the City of New Orleans". No other city was mentioned, although the statute authorized the circuit courts to designate other places where the court may sit. It was not until the Act of March 3, 1911 (ch. 231, 36 Stat. 1131) that Congress specifically referred to any other cities (Atlanta, Fort Worth, and Montgomery) as places where the Fifth Circuit might sit. By that time, however, the Clerk's Office and the Circuit Library were firmly entrenched in New Orleans. I submit that if the circuit is to be divided, Louisiana, Texas, and Mississippi should constitute the Fifth Circuit.

Please do not conclude from these observations that I am reconciled to what I regard as the ill-considered, pointless, irreversible partition of the Fifth Circuit. I am hopeful that Congress will not tolerate the Circuit's being ripped in two when the statistics for fiscal years 1974 and 1975 and the projections for 1976 and 1977 confirm my contention that the bisection will not bring even temporary relief: appeals are multiplying faster than appellate judges can be appointed to handle them. This is manifestly true, if one considers the annual appeals (40 to 45 a judge) that will be generated by newly appointed district judges who are an absolute necessity if the federal courts system is not to break down.

Assume (1) even a modest growth in population, commerce, and industry, (2) even a conservative estimate of an increase in federal question cases, and (3) even the appointment of only eleven district judges to the area now comprising the Fifth Circuit. By 1977 any relief will have vanished and, on the basis of the Commission's rationale for dividing the Fifth Circuit, both the new Fifth Circuit and the proposed Eleventh Circuit should then be partitioned further proliferating the circuits.

The evils in the federal courts system are naked to the eye. We have too many cases which should not be in the federal district courts; jurisdiction must be reduced. The federal appellate system creaks; it must be restructured. Federal internal practices and procedures are in the grip of a dead hand; they must be reformed.

I respectfully suggest that division of the Fifth Circuit will create a dangerous illusion of temporary relief that will delay effective reformation of the federal courts system.

Mr. WESTPHAL. Pursuant to the previous order of the chairman, this subcommittee will now stand in recess until 1:30 p.m.

[Whereupon, at 12:45 p.m., the subcommittee was recessed until 1:30 p.m., the same day.]

AFTERNOON SESSION

Senator BURDICK. Judge Gewin is the next witness.

STATEMENT OF JUDGE WALTER P. GEWIN, FIFTH CIRCUIT, TUSCALOOSA, ALA.

Judge GEWIN. Mr. Chairman, I would like to say that I am very grateful to be here for two reasons. First, I am happy to have the opportunity to make this statement. But about this time yesterday I got in a jet and started over the hillsides of Alabama, and in about 10 minutes they turned on the red lights and announced that one of the engines had gone out and we would have to turn around and make an emergency landing. My faith got a little weak, but when we got on the ground it was restored pretty well and I am happy to be here with you.

I would like to say, with all due respect and deference to my brothers Brown and Wisdom, that I must disagree with some of the conclusions they have reached. One of the main reasons given by them for not realigning is that the problem before us is so large and difficult that a solution of it will only create greater problems. It seems to me

to be untenable to say that, simply because the fifth circuit is so large, that if it is divided the two components will also be too large and will be difficult to handle. I also disagree with the statement about en banc consideration of cases being created by very few intracircuit conflicts. I think of the en banc cases we now have under consideration, at least three cases were placed en banc because of an obvious developing conflict in an area of the law in which the Supreme Court has very recently spoken concerning the 11th amendment in *Edelman v. Jordan*, which is a very difficult area. So it seems to me that en banc sessions are not limited to a simple conflict within the circuit but may relate in many instances to conflicts that are developing among panels because three different panels may have 11th amendment issues which bear vitally on what course the court should take.

In addition, I do not believe that you can furnish enough staff help to take care of the burden. A judge, sooner or later, will have to do the judging. Even with three brilliant young law clerks in my office, and with a staff memorandum, I think every judge feels in his own conscience that he must reexamine suggested conclusions and that he must look at the record and the briefs to be certain that the suggested conclusion or the suggested analysis is correct.

Assuming that a judge on the fifth circuit arrives at his office, we will say, at 8:15 or 8:30 in the morning, given the workload these days, on the average he is lucky if he gets to what I call his own work, his opinion writing duties before 11 o'clock. Very often that judge is unable to consider the cases assigned to him until 2 o'clock in the afternoon because of the flow of paper and other matters he must consider. These assertions are made only to emphasize the position of the eight judges whose statement I will file with the subcommittee. This statement was made before the Commission in Jackson, Miss., on August the 23d, I believe, of last year. I have letters from all of the judges reaffirming the position they took in the statement and asserting that they are more convinced now, having experienced the excess load for another full year, of the correctness of the statement than they were when it was initially made.

Shall I just read the statement, Mr. Chairman?

Senator BURDICK. If you wish.

Judge GEWIN. The undersigned judges of the U.S. Court of Appeals, Fifth Circuit, submit the following statement with respect to circuit realignment. The judges present will be pleased to respond to any questions which the Commission may wish to direct to them. We are grateful to you for the opportunity to make this statement.

We do not feel sufficiently informed to make specific suggestions with respect to circuit realignment on a national basis. Based upon our experience and service in the fifth circuit over a number of years, we do feel, however, that our recommendations for solutions that can ameliorate the problems encountered in the fifth circuit may be of value to the Commission.

It is our considered conclusion that the fifth circuit is geographically too large and that 15 judges is definitely 6 too many. It is extremely difficult for an appellate court composed of 15 judges to function with maximum efficiency. The sheer weight of administrative problems and

the necessity of one judge having to deal with 14 others impairs the judicial process. It is very burdensome for each judge to read and carefully analyze all of the opinions of the other 14 judges. Moreover, it is only natural that intracircuit conflicts multiply when there are 15 active judges.

Senator BURDICK. Excuse me, Judge, would you suspend for a minute? We are having a busy time on the floor; we're voting a lot. I'll stay for the five bells, which is the last call. If you would like to continue, you will have another 6 minutes left. As soon as the five bells ring, I'll have to leave the bench here, but if you don't mind completing after I leave, you might try to finish your statement in 6 minutes.

Judge GEWIN. I might be able to. All right, sir, I'll resume reading where I just left off.

It is to be noted that intracircuit conflicts between panels give rise to en banc proceedings. This problem would be avoided in large measure by prerelease circulation of at least all signed opinions. The adoption of such a sound judicial standard is hardly feasible, however, in a court rendering an inordinate number of opinions.

Intracircuit conflicts require the convening of en banc courts. At the present time there are 11 en banc cases to be heard. By the time the court convenes en banc, there will probably be at least 15 cases requiring disposition. It is not infrequent that one or two senior circuit judges are involved in en banc cases. However, assuming only 15 active judges are present and allowing at a minimum 10 minutes for each judge to express his views in conference, the deliberations in each case will consume 2½ hours. The 10-minute allotment may itself be unrealistic. In some instances a single judge has consumed substantially over an hour to present his views. But even assuming that only the active judges participate and take the minimal time allotment, 15 cases will require 37½ hours of conference time. Eliminating time for lunch and a short recess during the morning and the afternoon, and permitting 9 solid hours of uninterrupted conference per day, 15 cases will require more than 4 days of conference time. In addition, substantial time must be spent in preparation. While all en banc cases are not orally argued, the tendency is toward more oral argument, which adds to the workload. It often happens that a substantial number of judges will agree on one issue, but will be sharply divided on other issues. Since many en banc cases present multiple issues, it is virtually impossible to obtain a unanimous decision by 15 judges. Some of our en banc decisions require careful mathematical analysis to simply align the positions of the judges according to the issues decided.

It is the considered opinion of the judges who join this statement that the public interest demands immediate relief for the fifth circuit. Jumboism has no place in the Federal court appellate system. This statement applies both to geographical area and the number of judges serving the court. In spite of innovative procedures, long hours of work, and the decision of over 125 cases per judge per year, on the average, it is apparent that the fifth circuit cannot keep abreast of its mounting caseload. The populations of both Texas and Florida are expanding very rapidly. Much of the litigation in the fifth circuit

originates in these two States. It appears to be almost impossible for one circuit to accommodate two States which are growing at such a rapid rate which results in ever-increasing litigation.

Some have expressed the fear that any remedy is objectionable. This fear seems to be based upon the concept that any remedy which may be adopted will result in parochialism, provincialism, and a lack of cross-pollination amongst judges of different backgrounds which will seriously interfere with the court's traditional role as a national court. The undersigned judges reject out of hand this expression of fear.

The undisputed record demonstrates that the fifth circuit hears as wide a variety of cases as any circuit in the Nation. In addition it is recognized that the fifth circuit has been the active battleground of school integration cases, suits involving the integration of public accommodations, attacks on jury discrimination and other civil rights litigation. By innovative procedures we shortened the time for perfecting appeals, filing briefs and reaching decisions in school integration cases. *Singleton v. Jackson Municipal Separate School District*, 5 Cir., 1970, 419 F. 2d 1211. For example, in the fifth circuit we heard 166 appeals in school integration cases alone between December 2, 1969 and September 24, 1970—a period of slightly over 9 months. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, n. 5 (p. 13).

We believe it is fair to say that the six States which (in addition to the Canal Zone) comprise the fifth circuit are far more integrated on all levels than any other six States in the Nation. We have rendered more integration decisions than all of the other appellate courts of the Nation combined. A very high percentage of these decisions were unanimous. Admittedly, most of the decisions were rendered by three-judge panels, but during the critical period mentioned, all opinions were circulated to the entire court for possible objections prior to release. This practice is still followed.

We do not approve the classification of judges by the elusive concepts of "liberal" or "conservative," but if the judges of this court were so classified, it is obvious that neither a conservative group nor a liberal group could have dominated the court during the time mentioned. We believe the same statement could be made with respect to any 9 of the 15 judges who presently are in active service.

It is important to note that it is virtually impossible to mold the thinking of a particular court to make that court fit into a specific classification. History is replete with examples of the independence of judges who have disappointed the President who elevated them to office. Such is a historical fact. This historical fact has been true even in fortuitous circumstances which permitted a single President to appoint a majority of this court. For example, when there were only seven members of the Fifth Circuit Court of Appeals, President Eisenhower appointed five members in the court. The other two were appointed by Presidents Hoover and Truman.

It is interesting to analyze the retirement eligibility dates of the present active circuit judges of the Fifth circuit. This information is afforded by the following table:

Active judges :

*Retirement eli-
gibility date*

John R. Brown-----	1975—3 years.
John Minor Wisdom-----	1972—Now.
Walter Pettus Gewin-----	1976—3 years.
Griffin B. Bell-----	1983.
Homer Thornberry-----	1978—5 years.
James P. Coleman-----	1981.
Irving L. Goldberg-----	1976—3 years.
Robert A. Ainsworth, Jr.-----	1976—3 years.
John C. Godbold-----	1985.
David W. Dyer-----	1976—3 years.
Bryan Simpson-----	1968—Now.
Lewis R. Morgan-----	1978—5 years.
Charles Clark-----	1990.
Paul H. Roney-----	1986.
Thomas Gee-----	1990.

From the foregoing table it may be observed that two active members of the court are now eligible to retire. Within 3 years an additional 5 members of the court may retire. In 5 years an additional 2 members may retire. Thus, within the short span of 5 years, 9 of the 15 members of the court now in active service may exercise the privilege of retirement. One member of the court has retired this year.

It should be emphasized that any circuit realignment should result in a Federal appellate system which will suffice without further realignment for a period in excess of 25 years. In formulating a plan of realignment it would be a mistake to try to classify the philosophical attitudes of judges of this circuit and perhaps of other circuits. This fact is emphasized by the changes in personnel which will take place within the next 3 to 5 years in the fifth circuit, assuming there are no vacancies created by death.

The 15 active judges of this court have averaged writing 39 (plus) *signed* opinions per year. In addition each active judge has averaged disposing of an *additional* 86.6 cases by means of short per curiam or summary opinions. This is an average of 125 cases *per judge per year*. Assuming that 3 weeks are eliminated by holidays (Christmas, Thanksgiving, Fourth of July, et cetera) and vacations, 7 weeks for actual sittings, 1 week for attending the Judicial Conference, 1 week for en banc court, 1 week for three-judge cases and 1 week for special assignments (committees on judicial administration, the jury system, probation system, budget, et cetera), only 38 weeks remain for attention to the routine caseload of the court. Based upon the record of the average judge in active service in the Fifth Circuit, these figures demonstrate that each judge has averaged passing upon $3\frac{1}{3}$ (plus) cases each week during the time he was not sitting on the bench or away from his office on other important judicial matters.

The foregoing figures are astounding. They clearly demonstrate that the judges of the fifth circuit need additional time for contemplation, study, and for the preparation, revision, and refinement of opinions and decisions in order to maintain the high level of performance demanded of Federal judges. We would note also that not included in the figures outlined are concurring and dissenting opinions and numerous emergency motions for stays, writs of mandamus, pro-

hibition, and extraordinary relief which occupy much of each judge's time in a large and overbusy circuit.

Please understand that this statement is not intended as self-praise or as a complaint. Considering the problems involved, it is intended as a short delineation of unquestioned facts. This court needs your help. There is no hope of improvement short of legislative relief. The six States involved are growing and developing rapidly. Litigation of all types is increasing at an explosive rate. Some relief may be afforded by curtailing diversity jurisdiction, habeas corpus petitions by State prisoners, three-judge cases and civil rights suits by prisoners. However, it appears that even if substantial curtailment is accomplished in the areas mentioned, that factor will be nullified by the continuous enactment of legislation expanding the jurisdiction of Federal courts without a profound study of the impact of such legislation on this overburdened circuit.

Judge GEWIN. I would like to point out that the legislation referred to in the last sentence of the statement encompasses such matters as environmental protection, equal employment opportunity, the omnibus crime bill involving wiretapping, and other subjects unknown to the law a short time ago.

Thank you for your time and attention.

Mr. WESTPHAL. Do you have an extra copy of your statement?

Judge GEWIN. Yes sir, I have two or three copies.

I would also like to say, if I may, that Judge Roney from Florida who did not join in the statement at the time, told me Friday that he was writing a letter to the chairman of this subcommittee asserting that he has now concluded that it is inevitable that the fifth circuit should be divided.

Mr. WESTPHAL. Your statement contains the names of the seven judges, in addition to yourself, who subscribe to the statement that you have just made to the committee?

Judge GEWIN. Yes, sir, their signatures are on it.

Mr. WESTPHAL. And you have just said that Judge Roney does not subscribe to that statement, but that he will write the chairman a letter indicating his own views?

Judge GEWIN. Right, sir.

Mr. WESTPHAL. I think the record at this time might well indicate that the committee has also received correspondence from other members of the Court of Appeals of the Fifth Circuit.

Because they include observations other than the fact that they do or do not agree with Judge Wisdom's position, I think the record should reflect those observations as they have been expressed to the chairman and the committee.

So, Mr. Chairman, unless there is some objection, at this time, I would offer for the record Judge Ainsworth's letter of September 19, and Judge Gee's letter of September 19, addressed to Judge Wisdom, in which he indicates that Judge Wisdom is authorized to speak on behalf of Judge Gee.

[The above mentioned materials follow:]

[Editor's Note. In addition to those letters, mentioned *supra*, there are also included here the text of the letter sent to all fifth circuit judges, other than Judges Wisdom and Gewin and Chief Judge Brown, and the replies received by the committee from those judges. Judge Gewin's testimony is resumed following the last of these letters.]

SEPTEMBER 13, 1974.

Hon. _____,
U.S. Court of Appeals.

DEAR JUDGE _____: The subcommittee has scheduled hearings on S. 2988-2990 which are the bills embodying the recommendations of the Commission on Revision of the Federal Court Appellate System for geographical realignment of the Fifth Circuit. On September 24th, the first day of the hearings, I have arranged for the appearance of Chief Judge Brown and Judges Wisdom and Gewin. As a member of the above-mentioned commission, I am aware of the fact that in the testimony of these three judges the subcommittee will hear two different points of view on this issue.

My purpose in writing to you is to invite you to appear at hearings on either the 25th or 26th of September if you desire to express to this subcommittee your own views on the proposals to split the Fifth Circuit insofar as they may differ from such views as may be expressed by your three colleagues mentioned above. In the event you do not desire, or are unable, to appear on either of those days, the subcommittee would be pleased to receive in letter or statement form such views as you care to express involving the three alternative recommendations made by the commission.

The hearings on September 25th and 26th will be held in Room 457 of the Old Senate Office Building commencing at 10:00 a.m. each day. If you wish to appear on either of these days, I would request you call the subcommittee's Chief Counsel, Mr. Bill Westphal (202/225-3618) and make the necessary arrangements. I would also add that the subcommittee will make every endeavor to receive testimony or the written views of state bar associations and individual members of the trial and appellate bar.

With kindest regards, I am

Sincerely,

QUENTIN N. BURDICK, *Chairman.*

U.S. COURT OF APPEALS,
FIFTH CIRCUIT.

New Orleans, La., September 16, 1974.

HON. QUENTIN N. BURDICK,
*Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate,
Washington, D.C.*

DEAR SENATOR BURDICK: Thank you very much for your kind letter of September 13 relative to the forthcoming hearings before your subcommittee to begin on September 24.

I am content with the arrangements for the appearances of Chief Judge Brown and Judges Wisdom and Gewin. Therefore, I will not attend.

If realignment is to become a reality, the best, fairest and most appropriate division would be a circuit of Texas, Louisiana, Mississippi and Canal Zone, and one of Alabama, Georgia and Florida. This is the prime recommendation of the Commission on Revision of the Federal Court Appellate System. Simultaneously with passage of any realignment should be a companion measure to authorize the creation of such additional judgeships as will be needed. There is no doubt that additional judgeships are required.

I send to you and your able Chief Counsel, Mr. Westphal, my best personal regards.

Sincerely,

ROBERT A. AINSWORTH,
U.S. Circuit Judge.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
Austin, Tex., September 19, 1974.

HON. QUENTIN N. BURDICK,
*Chairman, Subcommittee on Improvements in Judicial Machinery, Committee
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I am grateful to you for your thoughtfulness in inviting me to appear before your subcommittee on proposals to realign the Fifth Circuit. While I would be happy to renew our personal friendship, I do not deem it necessary to appear and present any views which I may have on the proposals.

At the same time, I do express my urgent concern that if realignment of the Fifth Circuit is proposed, adequate additional judgeships should be provided in the same legislation proposing realignment. For instance, should the Congress in its wisdom propose realignment as recommended in its plan styled "Alternative No. 2," the "Western Circuit," composed of Louisiana, Canal Zone and Texas, would have over 49% of the present docket and only six judges. Should this particular realignment be proposed, I strongly urge that Congress must in the same legislation provide the additional judgeships needed to handle this docket.

I send you my warm personal regards and ask to be remembered to Mr. Westphal.

Sincerely,

HOMER THORNBERRY.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
Austin, Tex., September 19, 1974.

Re Circuit Realignment.

WILLIAM WESTPHAL, Esq.,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: I have learned indirectly that your Subcommittee will be hearing testimony on the above matter within a few days. So that my position may be clear, I enclose a copy of my letter of this date to Judge John Minor Wisdom authorizing him to speak on my behalf and epitomizing my views. I would appreciate it if this might be made a part of the Subcommittee's record.

Yours very truly,

THOMAS GIBBS GEE.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
Austin, Tex., September 19, 1974.

Re Circuit Realignment.

Hon JOHN MINOR WISDOM,
*U.S. Circuit Judge,
New Orleans, La.*

DEAR JUDGE WISDOM: I am advised that you will appear before the Subcommittee of the Senate Judiciary Committee (or the whole Committee, as the case may be), on September 24, 1974, for purposes of testifying on the desirability of splitting our Circuit. My views continue to be the same as yours in this connection, and you are entirely authorized to speak for me. As we have discussed, I think the cart is before the horse. Jurisdiction should first be examined. Commencing upon a program of circuit splitting without a searching re-examination of jurisdiction can only, if pursued to its logical consequences, eventuate into a system of mini-circuits comprising, in some instances, less than one state. Texas may well be one of those instances.

For those and other reasons, all of which you know and can express better than I, I think this road is a wrong turning.

Sincerely,

THOMAS GIBBS GEE.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C., September 23, 1974.

Judge THOMAS GIBBS GEE,
U.S. Court of Appeals, U.S. Courthouse, Austin, Tex.

DEAR JUDGE GEE: Upon receipt of your letter of September 19th, I became acutely aware of the fact that I owe you an apology. We intended to extend to you an invitation to appear before this subcommittee at the hearings on circuit realignment or to otherwise make known your views on this issue to the subcommittee. Apparently, our letters went out according to an outdated list of circuit judges which list obviously was composed prior to the time that you succeeded Judge Ingraham. I apologize for the oversight. However, it appears from your letter that in your infinite wisdom you have divined our unexpressed and uncommunicated intent.

We will certainly make your letter of February 19th to Judge Wisdom a part of our hearing record.

Sincerely,

WILLIAM P. WESTPHAL, *Chief Counsel.*

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Austin, Tex., October 7, 1974.

WILLIAM P. WESTPHAL, Esq.,
Chief Counsel, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: Thank you for your kind letter of September 23 which arrived while I was leaving for an en banc in New Orleans so that I was unable to reply until now. I entirely understand why I was not asked to the hearing and feel that John Wisdom could say what I had to say better than I could, anyhow. I am afraid that preserving the circuit is a lost cause, but I very much believe that Judge Wisdom is right and that we are selling our birthright for a mess of potage. I won't play the cracked record any more for you, however.

May I say that from the comments of the participants at the en banc which I mentioned, I can tell you that your knowledge of the subject and the penetrating questions which you asked at the hearing were remarked on very favorably. I am sorry that I did not get to meet you.

With best regards, I am,

Yours sincerely,

THOMAS GIBBS GEE.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Newnan, Ga., September 16, 1974.

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: In 1973, I joined with Judges Walter P. Gewin, Griffin B. Bell, James P. Coleman, David W. Dyer, Bryan Simpson and Charles Clark in a written statement concerning the desirability of the division of the Fifth Circuit Court of Appeals into two circuits.

It is my understanding that Judge Gewin will appear before your subcommittee on September 24th to testify concerning the proposed legislation. Since Judge Gewin will present a joint statement which will adhere to the views expressed by the above-named judges, I will not personally appear at the subcommittee hearings.

I wish to thank you and the subcommittee for this invitation.

With best regards, I am

Sincerely,

LEWIS R. MORGAN.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Atlanta, Ga., September 16, 1974.

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: Thank you for the invitation to appear before your Subcommittee regarding geographical realignment of the Fifth Circuit. My colleague, Honorable Walter P. Gewin, will appear on September 24 and his views on the subject coincide with mine.

In addition, I testified before the Commission on Revision of the Circuits last September in Jacksonville at some length and also presented a statement from the State Bar of Georgia.

I do not think that any further testimony on my part will be helpful to the Senate but I stand ready to assist your Subcommittee in any way possible.

Yours sincerely,

GRIFFIN B. BELL.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
September 16, 1974.

HON. QUENTIN N. BURDICK,
*Chairman, Subcommittee on Improvements in Judicial Machinery, Committee
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR BURDICK: Thank you so much for your kind letter of September 13, 1974, inviting me to appear before your Subcommittee on September 24, 1974, when it will hold hearings on S. 2988-2990.

I will forego the pleasure of appearing, since my views are entirely in accord with Judge Gewin's views and I am sure he will ably present our position.

With warm regards, I am
Sincerely yours,

DAVID W. DYER, *Circuit Judge.*

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
September 16, 1974.

MR. BILL WESTPHAL,
*Chief Counsel, U.S. Senate, Committee on the Judiciary, Subcommittee on Im-
provements in Judicial Machinery, Washington, D.C.*

DEAR MR. WESTPHAL: I have received Senator Burdick's letter of September 13 inviting my appearance at the hearing on September 25 or 26 if I care to express my views on pending proposals to split the Fifth Circuit insofar as they may differ from the views of Chief Judge Brown and Judges Wisdom and Gewin.

I have written Judge Gewin, copy attached, asking that he express my views.
Sincerely yours,

BRYAN SIMPSON, *Circuit Judge.*

SEPTEMBER 12, 1974.

HON. WALTER P. GEWIN,
*U.S. Circuit Judge,
P.O. Box 2729,
Tuscaloosa, Ala.*

DEAR JUDGE GEWIN: In connection with your prospective appearance to testify before the Subcommittee of the Senate Judiciary Committee (or the whole Committee as the case may be) on or about September 23, 1974, please be advised that I adhere to the views expressed in the statement prepared by you, Judge Bell and Judge Morgan, and circulated to and signed by Judges Coleman, Godbold, Dyer, Clark and me in addition to the three of you in August 1973.

I also adhere to the statement expressed in a letter I wrote to Chief Judge Brown on this subject, copy to all Active Judges, on April 10, 1974: "If it can be arranged for Judges Gewin and Bell, either or both, to appear before Senator Burdick's sub-committee, I will be content to let them speak for me."

I am confident that any views you advance at the upcoming Committee hearing in Washington will coincide with mine. Please feel free to express this view to the members of the Senate Judiciary Committee.

Sincerely yours,

BRYAN SIMPSON, *Circuit Judge.*

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
September 17, 1974.

HON. QUENTIN N. BURDICK,
*U.S. Senator, Subcommittee on Improvements in Judicial Machinery, Washing-
ton, D.C.*

DEAR SENATOR BURDICK: Thank you for inviting me to appear before the Subcommittee. Judge Walter P. Gewin is authorized to state my views. Since anything I might say would tend to be merely cumulative I do not plan to appear.

Sincerely,

JOHN C. GODBOLD, *Circuit Judge.*

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT,
Dallas, Tex., September 23, 1974.

HON. QUENTIN N. BURDICK,
*Chairman, Subcommittee on Improvements in Judicial Machinery, Committee
 on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Without any reservation whatsoever I wish to associate myself with Judge Thornberry's letter of September 19, 1974.

In my opinion it would be nothing short of catastrophic to saddle the six "Western Circuit" judges with the caseload that would be cast upon them if Alternative No. 2 were adopted.

Sincerely and respectfully yours,

IRVING L. GOLDBERG, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
St. Petersburg, Fla., September 23, 1974.

HON. QUENTIN N. BURDICK,
*U.S. Senator, Old Senate Office Building,
 Washington, D.C.*

DEAR SENATOR BURDICK: Thank you for the invitation to appear before the Subcommittee on Improvements in Judicial Machinery in connection with S. 2988-2990.

Although I can see no useful purpose in my appearing before the committee, I would like to express this view:

Regardless of what is done in order to afford the Federal Court Appellate System a full opportunity to discharge its responsibilities, and regardless of the salutary effect that any proposal which I have heard to date might have in relieving the current overload in the Fifth Circuit, our Circuit will have to be divided in the foreseeable future if the number of judges on the court is not to exceed 15, and if the court is not to fall hopelessly behind. Since a split of the Fifth Circuit, together with the addition of three judges to make a total of 18, will offer some immediate relief and is inevitable in any event, I am in favor of dividing the Circuit now.

Essentially, I am in accord with the conclusions of Judge Walter P. Gewin, who will be testifying before the Subcommittee tomorrow.

Best regards,

PAUL H. RONEY, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT,
Ackerman, Miss., September 17, 1974.

HON. QUENTIN N. BURDICK,
*Chairman,
 Committee on the Judiciary,
 U.S. Senate,
 Washington, D.C.*

DEAR SENATOR BURDICK: I sincerely welcome your letter of September 13 with reference to the possibility of my appearing at hearings before your Committee on either September 25 or 26.

I would be pleased to take advantage of this opportunity, and would hope that it would be convenient for me to be heard on the morning of September 25, as I have no problem with hotel reservations at that particular time.

While I have not talked with Mr. Westphal, I have talked with Mr. Stockett, and I understand that they are making the appropriate arrangements.

With best wishes, I am

Sincerely yours,

JAMES P. COLEMAN, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
Jackson, Miss., September 23, 1974.

Hon. WALTER P. GEWIN,
U.S. Circuit Judge,
P.O. Box 2729,
Tuscaloosa, Ala.

DEAR JUDGE GEWIN: I continue to adhere to the views expressed in the statement which you submitted to the Commission on Revision of the Federal Court Appellate System at its hearing in Jackson, Mississippi on August 23, 1973.

Respectfully,

CHARLES CLARK, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
Houston, Tex., September 18, 1974.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: I have your letter of September 13th in which you extend an invitation for me to appear and testify before your committee on September 25th and 26th.

It will not be convenient for me to appear in Washington at that time and I therefore express to you and the members of the committee regrets that I will be unable to appear. However I believe I can here briefly state my views on the subject. I am firmly of the view that the Fifth Circuit is too large and unwieldy and that it should be divided. I have heard that Senator Eastland has said that the Fifth Circuit is not a court but a convention.

One of the proposals to split the Fifth Circuit would place Texas and Louisiana in the western part, and another would place Texas, Louisiana and Mississippi in the western part. I believe the plan that would place only Texas and Louisiana in the western portion would probably be a more equal distribution. Then I understand that there is a question whether the Canal Zone should be attached to the eastern or western portions. My view on that subject is that the Canal Zone, being as far east as Florida and Georgia and having direct airline connections with Florida, would properly be more appropriately placed with the eastern portion.

With kindest regards, I am

Sincerely yours,

JOE INGRAHAM, *Circuit Judge.*

[Judge Gewin's interrupted testimony resumes.]

MR. WESTPHAL. According to the Administrative Office figures, the four States of Florida, Georgia, Alabama, and Mississippi, plus the Canal Zone, had a total of 1,738 filings in fiscal year 1974. Now, that caseload, distributed over a nine-judge court, would result in appeals commenced at a rate of 193 appeals per judge. By splitting those four States off from the present fifth circuit and putting them into a separate circuit, there would not be much relief from the caseload that the judges of the fifth circuit are presently carrying. Since in 1974 the filings in the fifth circuit averaged 219 for each of the 15 judges. Do you follow my mathematics on that?

Judge GEWIN. I think so.

MR. WESTPHAL. Unless more than the nine judges who are presently located in those four States are employed upon the work of those four States, there would be no appreciable relief in workload simply by splitting those four States off from Texas and Louisiana. Isn't that true?

Judge GEWIN. I think, mathematically, you have correctly stated it, but when you are sitting on a 9-judge court, as distinguished from a 15-judge court, at least you don't have to deal with 6 more judges on every case. While we love each other and have no feelings of

animosity, dealing with 14 other judges is a great deal more difficult and time consuming than dealing with 8 more; to have to read what each says and reconcile his position with yours and deal with all the administrative matters makes the caseload and administrative problems even greater.

I think, while the caseload might be equal, the problem of dealing with vast numbers of judges would reduce the time you have to spend in such endeavors.

Mr. WESTPHAL. If only nine judges were employed on the work of those four States, those nine judges would still have to employ a screening technique, would they not?

Judge GEWIN. Well, sir, I suspect, whether we like it or not, to meet the demand of present day litigation screening is inevitable.

Mr. WESTPHAL. That would mean that there would be some percentage of cases that would still be decided on the briefs, without the benefit of oral argument?

Judge GEWIN. That is correct, sir, but I would like to say this with respect to screening.

We have been very much occupied with solutions to the problem—and I have consulted no one about this—but I think before we actually implemented screening to its present state of perfection—if I may use that expression—it might have been better if we had had members of the bar come and hear what we were doing. We might have put to them this simple question: “Would you rather have some of your business-type cases involving securities, liability of one kind or another, and contract arrangements postponed for 3 years, or would you rather have a decision without oral argument in some cases?” That is the stark fact that faces this court and the bar, whether we like it or not.

Mr. WESTPHAL. I think you have made the point. If the Congress should fashion those 4 States and the Canal Zone into one nine-judge court, and if that nine-judge court should have the caseload as evidenced by the 1974 figure of 193 per judge, that nine-judge court would have to screen cases; it would have to deny oral argument in a certain number of cases; it would have to use a Rule 21, in one form or another; and it would have to have the services of staff attorneys in order to keep up with a caseload of 193 per judge, would it not?

Judge GEWIN. Yes sir, I think it would, but I would like, if we could, to reduce the percentage of screening from 50 percent to a lower level, and I don’t see at this point how we can do it.

Mr. WESTPHAL. If your caseload for 9 judges in this four-State circuit were 193 per judge, compared to the existing caseload of 219 cases per judge for 15 judges, which is only a difference of 26 cases per judge, it seems very likely that the four-State circuit would have to face, with or without the consultation of the bar, the same hard choice: That is, you either adopt these expediciencies in order to keep your head above water, or you ask the lawyers to wait up to 3 years in order to have their cases decided by that nine-judge court sitting in that 4-State circuit. Do you follow me on that?

Judge GEWIN. Yes, sir. May I make a statement on this point? I do not disagree with Judge Wisdom and Judge Brown regarding their suggested jurisdictional solutions. I think that Congress upon consideration, may well see the wisdom of reducing jurisdiction in whatever area it may choose here. But I speak about this division as some-

thing that will help now, not as the exclusive remedy for all time, because Congress must decide whether they wish to continue to enlarge our jurisdiction and keep us overloaded or whether they wish to curtail jurisdiction in some areas. Environmental law is new to most judges, and it takes a lot of study. Discrimination in employment presents difficult problems of back pay. As I say, it will take, perhaps, both remedies from a long-range point of view.

Mr. WESTPHAL. Of course, along the same line, the statistics which we have reviewed also mean that the chances of this new four-State circuit court hearing oral argument in more cases and having more time for deliberate consideration of the issues in all important cases would be enhanced if, instead of 9 judges you had the 11 judges needed to reduce the caseload per judge to about the 1973 national average of 161. Isn't that true?

Judge GEWIN. While I don't call nine a magic number, I will call it a traditional number. I think that almost 200 years of history have demonstrated that there is some wisdom in the number "9." But if you get into an emergency situation where the Congress wants to expand the jurisdiction of Federal courts and the courts expand their own jurisdiction, then maybe you will have to take more than the nine. Every time you go up beyond that traditional number, however, the best solution to the problem may not be presented. Other remedies would probably be better.

Mr. WESTPHAL. What I am suggesting, Judge, is that, unless that four-State circuit has a bench of 11, the benefits to be achieved by splitting those four States off into a new circuit would not be reflected in a lower caseload per judge or in less of a need for a resort to some of these expediciencies we talked about. The benefit would solely be that, instead of having to review the work of five panels, you would only have to review three panels.

Judge GEWIN. That is correct.

Mr. WESTPHAL. Instead of contacting 15 judges on an en banc matter, or Judicial Conference matter, you would only have to consult nine judges. That would be the only benefit derived by splitting off four States from Texas and Louisiana, unless you started out with a complement of 11 judges.

Judge GEWIN. I would hate to say it is the only benefit.

I don't know what others to mention at this moment, but when you say "only," that should not minimize the substantial benefit—

Mr. WESTPHAL. I appreciate that fact. My point is this: If Congress is concerned about the attitude expressed by members of the bar—that they are dissatisfied with a denial of oral argument in too many cases, being dealt with under Rule 21, that they are dissatisfied with some of these other expediciencies—then the only way to try to alleviate their dissatisfaction is to employ more and more judges so that there will not be so great a need to resort to so many expediciencies.

Judge GEWIN. Inevitably true, sir.

Senator BURDICK. Looking at the two States of Texas and Louisiana, that, under one proposal would constitute a separate circuit, those two States would have a caseload of 250 on a per judge basis for the judges that are from those two States. They would have a caseload of 258 per judge, which is 39 more than the caseload per judge in the existing fifth circuit. Again there can be no relief from all of these things

unless the judge complement in that two-State circuit is increased beyond the number 6, at least up to 9. Isn't that true?

Judge GEWIN. I should think it would have to go beyond 9, if you give them the same number that the eastern side would have, 11 for the number of cases you mentioned, they would get more than 9; would they not?

Mr. WESTPHAL. Nine judges employed on a caseload of 1,558 would give you a figure of 172 per judge, which is 11 cases more than the national average was in 1973, so that, again, in the case of that two-State circuit it would not take much of an increase beyond their 1974 caseload before you reached the necessity of having to create 11 judgeships.

Judge GEWIN. Yes, sir, but may I make one observation. You must look at the viability of the alternatives. Suppose you divide the circuit and have two circuits with 11 judges. That means, if you don't divide it, we would have one circuit with 22 judges, and I don't know how to say just "good morning" to 22 judges over the telephone and have time to do anything else that day.

Mr. WESTPHAL. As I suggested to your Chief Judge Brown, that gets right the heart of the question. If we must have more judges to handle this expanded caseload, the question seems to me to be whether we employ 22 judges on one bench or 11 on each of two benches.

Judge GEWIN. I think that is inherent in the problem. You have to realize that, if you have 22 judges on one bench, 1 judge has to keep up with 21 others. There is just a limit to the mind of a man like me. I will have to conclude that it is difficult to keep up with 14 others now, and I don't believe, under the facts of life, that I could conscientiously keep up with 21.

Mr. WESTPHAL. The only thing that I know of that has been advanced as a scenario, by which you could have a 21- or 22-judge court and avoid the problems you have just mentioned, is a suggestion that emanated from a 1968 study, made by the American Bar Foundation, of the problems of increased workload upon the people in the courts. There was a suggestion, which was put forward in a Law Review article by Prof. Paul Carrington, who was executive director of the study. You will recall that his suggestion was that, if you have to go to the 21-judge court, you organize the court in 7-judge divisions and assign a certain subject matter jurisdiction to each one of those divisions, giving them—not a centralized docket—but as general a docket as you can, while, at least for the law of the circuit and en banc proceedings, they are combined to constitute one body composed of the three 7-judge divisions. That would be a variation on the theme which would mean that, for the period of time you were assigned with 7-judge divisions, you would really have to concern yourself primarily with the work product of that division and not so much with that of all 21 judges. Now, that is the only plan I know of that would have some feasibility insofar as a system having 21 or 29 judges on a given court. Do you know of any other system that would be feasible when you reach a number of judges which exceeds 20 on a given court?

Judge GEWIN. I don't know of any number that would be feasible, but that is not to say I think that number would be feasible.

I don't know whether you would call a court that large a thing or a "thing-a-ma-jig" or what. It still has to be some kind of unit.

The same people will be living in the fifth circuit, if we use that as an example, but some will be in division (a), some in (b), and some in (c). I can't conceive of such a functioning group achieving uniformity of decision or equality of treatment in every area of the law, especially, as he suggests, if assignments are made as general as possible. Well, how general is that? It seems to me you must go from criminal to antitrust. I don't want to be only a prisoner's judge or only an antitrust judge. I think we should take the cases as they come. I do not think we should say, if you are from division (a), you will go to this fine group, but if you are from (b) you must go over here and then possibly to division (c). It is difficult for me to see an operation of that kind.

Mr. WESTPHAL. In other words, you feel that the Carrington proposal would present some of the same difficulties, in an institutional involvement, as a court of 15 presents in the terms we have been using?

Judge GEWIN. This may be a self-serving declaration, but it doesn't apply to me only. I believe the 15 judges I have known have operated as well as any 15 could operate. We are congenial and effective.

With reference to one of the suggestions that was made by my brother Wisdom, who decried so vociferous a parochial system, to pick 5 judges out of 15 and say they will be the ultimate decisional group of this body and will decide the conflicting cases and the other 10 shall not have a voice in a given case seems to me to be self-defeating. I believe that, if we are going to have a national court, it may be more important to have it on the eleventh amendment cases than it would be some other less important cases.

Mr. WESTPHAL. There is also another disadvantage to a court that is as large as 15 or 20 judges. The projections from the Administrative Office, and the projections of Chief Judge Brown's exhibit No. 32, indicate that by the year 1977 the four States that we have talked about will have a caseload which, in order to maintain a level of 161 cases per judge, will require us to go right back up to 15 judges in those four eastern States by the year 1977. So, instead of having 25 years of relief, we may in fact find we have only 3 or 4 years of relief, or less than that. How can the Congress avoid the pitfalls of what is going to happen as this caseload continues to grow?

Judge GEWIN. I would make one respectful suggestion. It is really no solution to say—I don't mean to be facetious—it is really not a solution to say that the problem is getting so big that to divide it you will have two other courts that will be getting too big. You must consider the fact that, if the two new circuits become overlarge, the one that was divided would have been far too overlarge.

But it would be my hope and my sincere plea to the Congress that during whatever interim there might be, 2 years or 3, that they might come to such considerations as curtailing diversity, or curtailing jurisdiction over many of the cases we now have. I think it will take both solutions to ultimately get the problem solved. It is just too broad to run down this little alley here and stop. I think we must look at the overall problem.

As to those ideas about having some kind of tribunal to pass upon prison cases, we have been through various phases of that before. A man in the penitentiary will never be satisfied until he is out, and he

will never quit hounding the court as long as he thinks he has a chance. That is illustrated by the fact that he is never satisfied with the process. He has had all of the administrative procedures. We say we won't review your case until you have exhausted all those procedures. As the chairman pointed out this morning, it doesn't take long for them to go through that, and although we wait, the big load comes anyway.

Mr. WESTPHAL. I don't think I can fully summarize or equate your position and, for example, Judge Wisdom's, but it seems to me that I hear Judge Wisdom saying to us, "Don't split the fifth circuit now; let's try these other things, and, if we cannot get sufficient relief from them, then it may be necessary to split the fifth circuit in some way." By the same token, I understand you to say, "Split the fifth circuit now because we, meaning the litigants in that circuit, need immediate relief. If, as others fear, the caseload continues to expand to the point where we once again achieve a court of up to 15 in number, maybe by that time Congress will have had the opportunity to curtail the caseload input into the Federal courts in those areas where it may be proper to curtail it, and we may be able to devise some administrative way of handling at least the 1983's that come out of the institutions. There may be some relief in that way that would make it unnecessary for circuits to be split any further as the caseload grows." But then that caseload grows and proliferates. So it is just a question of where you put the emphasis. In the final analysis we all recognize that we are dealing with the same problem, is that not so?

Judge GEWIN. Yes, sir, we are dealing with diagnosis and prognosis essentially. I diagnose the patient as being rather ill today and needing some emergency relief. We may get into a prognosis that will show that he will be that ill again a little while later, but at least that will give us an opportunity to administer other remedies.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Senator BURDICK. I will read carefully the questions I was unable to ask you when I was voting.

As you practice the screening process in the fifth circuit, it gives to any one of the three judges assigned to the case the right to ask for an oral argument. Do you think there has been any denial of justice under that procedure?

Judge GEWIN. No, sir, I don't think there has been. Every week, sometimes every day for a time, we write to our panel members and say, "please reclassify this case as a No. III." I had to do that Friday on the simple question of whether a jury, in a case involving a man charged in a six-count indictment with the sale of narcotics, could find that man not guilty under the first two counts because of entrapment, but could find him guilty under two other counts. In that kind of case, we put it on the oral calendar.

I would have to say this, Senator Burdick: I personally am deeply conscious of the very real fact that courts live upon confidence and respect. That is the reason why I adhere very avidly to some of the rules, for instance, disqualification because of ownership of one share of stock where there are 5 million outstanding. I embrace the idea because I want the man on the street to think that judges are honest and sincere and doing the best thing possible for the country as a whole. When the bar, and through the bar, the clients, think, whether with justifiable cause or not, that we are denying oral argument in

too many cases, that does worry me. As Mr. Westphal said this morning, for nearly 200 years people, with great respect, have said "The judges have ruled and we will follow the rule of law," and therefore they do. But I would hate to engage in any process, however justified, which would destroy that confidence and that respect. That is why I do sometimes become a little shaken about the number of cases we place on the summary calendar.

Senator BURDICK. We are mindful of the fact that there are some appeals which are taken entirely without merit and that granting oral argument in those cases would be just obliging the lawyer.

Judge GEWIN. There is a vast number of cases that should never go up on the oral argument docket. I would say, however, that it might be better, from a public confidence standpoint, to reduce somewhat the number of cases not accorded oral argument right now——

Senator BURDICK. None of those lawyers I just referred to are from North Dakota, of course.

Judge GEWIN. I say that as one who has been in the courtroom for 26 years and sometimes left elated and sometimes very depressed.

Chief Judge BROWN. Mr. Levin, Mr. Chairman, may I say one thing? I hope that you have sensed from what you have heard today, and from what you will hear tomorrow, that, even with our differences of views, there is no acrimony or bitterness on the fifth circuit. You can split us, and somehow we will survive, but when I come back 2 years from now, I don't know whether I will be representing the 5th or 11th circuit.

Senator BURDICK. I underscore your statement; you will survive.

Judge GEWIN. If there is a judge who could preside over 25 judges, I would nominate Chief Judge Brown.

Senator BURDICK. We will now stand recessed until tomorrow morning at 10 o'clock.

[Whereupon, at 3:35 p.m., the subcommittee was recessed until 10 o'clock, Wednesday, September 25, 1974.]

CIRCUIT REALIGNMENT

WEDNESDAY, SEPTEMBER 25, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick (presiding) and Hruska.

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel; and Kathryn Coulter, chief clerk.

Senator BURDICK. This is the second day of hearings on the realignment of the fifth and ninth circuits.

Our first witness this morning will be Hon. James P. Coleman of the fifth circuit.

Mr. Coleman, welcome to the committee.

STATEMENT OF JUDGE JAMES P. COLEMAN, FIFTH CIRCUIT, ACKERMAN, MISS.

Judge COLEMAN. Thank you, Mr. Chairman.

Senator HRUSKA. Mr. Chairman, may I extend a word of welcome to Judge Coleman and Judge Clark?

Last summer when we went to Mississippi with the Commission, they were present and—I believe you, Judge Coleman, were present in New Orleans.

Judge COLEMAN. Senator, I was just in Jackson, not in New Orleans.

Senator HRUSKA. We not only had a well-arranged session for testimony and a very informative session, but they extended the traditional hospitality of Mississippi to us at noontime, just before we boarded our plane. We had a nice social time as well as a useful professional and business session.

Mr. Westphal was there and he can confirm my judgment of the proceedings.

Mr. WESTPHAL. I say amen.

Judge COLEMAN. I hope that you can come back and that Senator Burdick can come the next time.

Mr. Chairman and members of the committee, with your permission I would like to make a brief statement in organized form, after which I shall be happy to try to answer questions if there are any to be propounded.

I am one of the circuit judges of the fifth circuit.

You have heard Judge Gewin's presentation so I shall not address myself to that subject.

I am here to discuss where the State of Mississippi is to be assigned, if such a division is made. I recognize that this decision rests solely with the Congress, with the approval of the President.

My purpose is to present considerations which I hope will be of assistance in reaching the most nearly correct answer to the question.

I understand as a judge, and in private life, that there are many questions to which there are no perfect answers. We just have to look for the best available answer.

In making my presentation today, I speak as one who for 9 years has served on the fifth circuit bench. Before beginning that tour of duty, it had been my privilege to serve a composite period of 16 years as a State district attorney, a State circuit judge, on the State supreme court and as the Attorney General of Mississippi.

Additionally, I spent 4 years as a member of the State legislature and 4 years as Governor. So I have had experience from the executive and legislative, as well as from the judicial, standpoint.

Of considerable importance, I think, is the fact that, from 1935 to 1939 I worked here on Capitol Hill as an administrative assistant to a Member of Congress. I started when I was 21 years of age. At that early time I learned to look at matters from a national standpoint, and not from a purely local or provincial approach.

I might say that those 4 years here in Washington were a great bank of experience upon which I have drawn in all of the nearly 40 years since.

From the official report of the Commission, it is seen that, if the badly needed division—and I say that deliberately—if the badly needed division occurs, Florida, Georgia, and Alabama will most certainly be in one circuit. It is equally obvious that Texas and Louisiana will be in another. So the sole remaining question is, "Where should Mississippi go?" We are right in the middle.

I sincerely hope that Mississippi will be aligned with its sister States east of the Mississippi. It is an honor to serve the great States of Louisiana and Texas—and they are great—and my views here today indicate no lack of love or respect or affection for those States—but we are looking now not to personal wishes or desires, but to the future welfare and operation of this fifth circuit court.

I simply believe that, if a separation is to occur, then Mississippi should not be aligned across the river.

As we all know, the Mississippi River is the dividing line between the sixth and eighth circuits, and it is also the dividing line between the seventh and the eighth. The only circuit in the United States bisected by the Mississippi River today is the fifth circuit as presently constituted. This bisection occurred in 1891, 83 years ago, the year that my mother was born. It must be remembered that 83 years ago our six States were almost altogether agricultural.

Until 1929, one Federal trial judge took care of all the Federal court business in Mississippi. Since 1891—and for nearly 50 years after 1891, to be conservative about it—there was very little for the Federal courts to do in the South, because we were a nonindustrial section of the United States.

When the circuit was set up, the automobile was nonexistent, oil had not been discovered in Texas or in Louisiana, and the Houston Ship Canal had not been built. Today, the situation is altogether different.

In area, population, industry and financial activity Texas would suffer no distortion at all if it were in fact four States. Some would like to approach it as just one State, but as Judge Clark will later point out in some of his remarks, it is the equivalent—on almost any yardstick—of at least three of our States east of the Mississippi River rolled into one.

Now, oil, gas, admiralty litigation, offshore drilling litigation, and cases of that type in Texas and Louisiana set those States apart as unique judicial territory. They require highly specialized legal training as well as judicial experience in the fields not so familiar to the lawyers east of the Mississippi. Moreover, Texas and Louisiana are the only community property States in the circuit. They distinctly operate from civil law beginnings, whereas the legal systems of the other four States of our circuit are grounded solely on the common law.

Back when I was practicing law, if I happened to be fortunate enough to get a case in Louisiana, the first thing I did was to hire a Louisiana lawyer, because I knew I was totally lost in the Louisiana civil law system which has come down from the Code Napoleon.

As presently constituted, Florida, Georgia, Alabama, and Mississippi already have nine circuit judges. East of the river, we have our nine.

Therefore, it would not be necessary to appoint any additional judges for this region. Texas and Louisiana presently have six circuit judges, and—considering that nine is the ideal number—we had a good deal of talk about that yesterday and you may question me about it later, but I still say nine is the ideal number, and I say that from experience—but considering that nine is the ideal number of judges for an appellate court, three additional judges would be appointed from Louisiana and Texas for that new circuit, and this would present the opportunity to name men who are highly experienced in the particular fields which I have mentioned, and others, which presently consume so much of the time of the court as it is now constituted. This one consideration alone would prompt me, if I had a vote in the matter—which, of course, I do not—to let the four States east of the Mississippi remain together while combining Texas and Louisiana.

Now, there are a few other points which I would like to make very quickly, because I do not wish to consume your time with a lengthy statement. I found out yesterday that this committee already knows all about this. I doubt that you have heard a thing that you did not already know, but we appreciate the opportunity to talk to you about it.

As the circuit is presently constituted, with six States, it covers half a million square miles, 531,000 square miles. It includes nearly 32 million people, 31,880,000. The land area of the four States east of the Mississippi is 216,794 square miles. The land area of Louisiana and Texas is 314,402 square miles, 50 percent larger than the area east of the Mississippi. In 1970 the population of the four States east of the Mississippi was 17 million. The population of the two States west of the river was 14 million.

Now, that brings us to the matter of caseloads. I hope, possibly. Mr. Westphal in the very comprehensive way he has of going into this, when he comes to questions may talk about this some more; statistics can be very misleading about the status and the activities of the court. But at this point I want to say that during the year ending June 30, 1974, 2,572 appeals were docketed in the fifth circuit. Those figures do not tell you what you get from the Administrative Court, which includes all kinds of petitions, motions, and things. But these are the figures I got directly from our clerk about a month or so ago. As of June 30, 1974, we had 2,582 appeals docketed in that fiscal year—1,368 of these appeals were from east of the river; 1,197 were from Louisiana and Texas, plus 7 from the Canal Zone.

Now, of the 2,572 docketed cases, only 128 were from Mississippi, which clearly shows that the addition of this caseload to the west or to the east will really make no difference in the overall burden of the judges, whether they are serving east of the river or west—only 128 out of a total of 2,572.

Many cases require very little judicial effort. Members of this committee and counsel, of course, are lawyers and they know about those things. A case is a case is a case. We have cases that you can do your duty by in 15 minutes, as Senator Burdick was pointing out yesterday in connection with oral arguments.

I recently worked for 3 weeks on one Federal Power Commission case, and, after we had finally reduced it to writing on a very serious question of jurisdiction, and the other three judges agreed on what I had written, the parties notified us they had settled the case. That is one thing you run into when you start dealing with statistics. Many cases are so novel or extensive that, really, weeks are required for analysis and decision. But Mississippi generates very few cases of this kind, as an examination of our docket will show.

There is one other factor which, on the surface may be rather intangible, but nevertheless has its impact from my experience, and that is that both Mississippi and Alabama were originally a part of the State of Georgia. We were formed from the State of Georgia. It is our mother State. With our legal systems going back to the same common source in Mississippi, Alabama, and Georgia, I am quite certain that the business and the efforts of the judges on our court would be greatly expedited and justice certainly could not be harmed if we were put together and allowed to work together.

Now, I have heard fears expressed that a divided circuit might lapse into provinciality or into parochialism. I want to say that I have no fear of this. The Supreme Court is always there, and if provinciality and parochialism were to rear their heads east of the river it would not take the Supreme Court long to put them down, and, of course, no judge—I have been both a trial judge and appellate judge—but no judge with just pride in the exercise of his duties either desires or intends that his decision shall invoke the reversal of a higher tribunal.

Again, in closing, let me emphasize that, by grouping Florida, Georgia, Alabama, and Mississippi you will have a ready-made court of nine judges all set to go without further ado, and to me of equal importance, the opportunity will arise for the appointment of three additional judges from Texas and Louisiana from a pool of legal talent better fitted to handle litigation centered in that area than would

be judges appointed from east of the river with no special experience in each of those States. I sincerely hope, when all the factors are evaluated, that the Congress in its wisdom will see fit to leave Mississippi where it geographically belongs, and that is east of the Mississippi River, along with its sister States of Alabama, Georgia, and Florida.

Thank you very much, Mr. Chairman.

Senator BURDICK. Thank you, Judge.

Senator HRUSKA?

Senator HRUSKA. Judge Coleman, when we had the hearing last summer in Jackson, Miss., we were informed that a majority of the judges in the fifth circuit favored a division of the fifth circuit, so that it would become a manageable circuit and one more conventional to the circuits generally throughout the United States. Has any change of opinion occurred since that testimony was given?

Judge COLEMAN. Not any that I know of, except that, after another year, Senator Hruska, those of us who believe in the necessity for a division have occasion to believe it more strongly, and Judge Gewin, in his remarks yesterday—which probably have not been transcribed yet for you to read—emphasized that point.

We think the time has come that, if we are to maintain the right of appeal, if appeals are to be meaningful rather than just a form, or going through the motions, there just has to be a division.

Now, it has been suggested that, even if a division is made, in a year or two you are going to be right back in the same situation. Well, I do not know whether that is the case or not, but I never have thought that, when you have something that stands badly in need of remedy, you should withhold the remedy out of fear that the future might necessitate something else.

The whole thing is, as I said, that this circuit was set up in 1891 under different circumstances and conditions. I am satisfied that if the Congress today were setting out to organize courts of appeals, as it did in 1891, you would never for a minute think of making a circuit out of all this vast territory from Savannah on the Atlantic to El Paso way out on the Rio Grande.

Senator HRUSKA. But it made sense at that time?

Judge COLEMAN. Absolutely. Up until about 1965 is worked fine. I was appointed to the court—both Senators now on the bench remember when I was appointed, I am sure. We were getting 800 cases a year. We had only nine judges. We were getting along fine. Everybody was receiving oral argument. But then, of course, under the impact of circumstances well known to the Senate and the House of Representatives, the caseload escalated to 2,500, 2,800, or 3,000, depending on who is counting and how they are counting.

Although it made absolutely perfect sense in 1891, I think it is contrary to all good judgment to suggest it be left to that, although two of our brothers testified here yesterday that they wanted it left that way.

When you consider that the Federal courts today completely reorganize the State—they act in regard to the election of its legislatures under the one man, one vote rule; they realign congressional districts under the one man, one vote rule; they take over the operation of penitentiaries and mental hospitals—I do not know why we

should not be subject to the same changes when they are necessary. We give it to others. We ought to be prepared to take our own medicine if it is indicated to be the thing that ought to be done.

Senator HRUSKA. I followed your statement here in the testimony with a great deal of interest, Judge, and I want to make one observation, Mr. Chairman. I think it does recite in a concise and understandable form the essence of the arguments and the basis for a division and also the character of the division of the States. I want to thank you very much for appearing here for this purpose, Judge.

Judge COLEMAN. Thank you, Senator.

Senator BURDICK. Judge Coleman, you have a very good background with your experience in the legislative branch and now the judicial branch. You have been around.

Judge COLEMAN. I have been the beneficiary of the kindness of some mighty good people.

Senator BURDICK. That is why I want to throw you a curve.

Judge COLEMAN. All right, sir.

Senator BURDICK. Which of the two new districts would carry the name "Fifth"?

Judge COLEMAN. That was brought up here yesterday, Senator Burdick. I think the Commission recommended that the fifth—or that the designation "Fifth"—remain with the group east of the river, but by whatever name it is called, it would be all the same to me, just so we get into shape where we can attend to our business. I do not care whether we are called the eleventh or the one-hundred eleventh as far as the name is concerned.

Of course, there is great pride, of course, in the name "Fifth."

Senator BURDICK. I asked that question with a certain degree of levity, but there is still a question. Is there any merit in the "Fifth east" and the "Fifth west?"

Judge COLEMAN. Well, if they are going to be separate and independent circuits, then it should be just that way.

We come to these things. When I was Governor of Mississippi, for example, I tried my best to get the legislature to reapportion itself, and it would not do it. The time came when the Federal courts were to do it under the one man, one vote rule. I live in a small county where my people have lived since 1835. At one time in the past it had three Members of the House of Representatives. It got down to one. Sitting on that three-judge court, I had to combine Choctaw with Webster. Now we share one Representative with Webster. These changes just have to be made, and they do come about. So, whatever number the Congress assigns to us, I would be happy.

Senator BURDICK. Well, that leads to the next question. It was suggested yesterday—mildly at least—that perhaps the fifth remain the fifth and have its headquarters in New Orleans across the river; would that work out very well?

Judge COLEMAN. You mean let both circuits have their headquarters in New Orleans?

Senator BURDICK. Yes.

Judge COLEMAN. No, sir, I do not think it would work. That would be very much like having two families in the same house. I do not think so.

I suppose—although again I am sure the Senators and Congressmen would have a great deal to say about this—but logically, I suppose the circuit east of the river would have its headquarters in Atlanta because they have a new building under construction there now which would furnish housing and all. But regardless of what room we meet in or what house or what city we meet in, we need to get some room in which to really operate.

Senator BURDICK. I understand that this is just a side issue. But I think we need a little guidance from our judges.

Judge COLEMAN. If I had anything to do with it, I would not suggest that both circuits be housed in New Orleans.

Senator BURDICK. Yesterday we heard a considerable amount of testimony from the other judges that there are some innovations that we could adopt—some procedures we could adopt—that would save us time. We heard about the screening process, the limiting of oral arguments and so forth. Do you think there is considerable amount of judge time to be gained by such procedures in the future?

Judge COLEMAN. Senator Burdick, when screening first came up and was presented to our court, there were only two judges on the court who voted against adopting the procedure, Judge Wisdom and myself. I voted against adopting screening to start with because I am just a great believer in oral argument. I came up in a country where oral argument is a strong tradition.

I have seen cases, sir, since I have been on the fifth circuit, where we have read the briefs, you know, in advance and tried to familiarize ourselves with the cases, in which I have had my preliminary opinions changed completely by what I heard at oral argument. There are many cases of such complexity and intricacy that you need it. But I also agree with your remark yesterday that there are many, many cases where oral argument is just not going to help anything at all, particularly in criminal cases.

We have appeal after appeal now under the Criminal Justice Act. All the lawyers appeal because they do not want to be charged with incompetency of representation or inadequate representation. A man files a post conviction motion alleging that, "my lawyer did not even go down and argue my case on my behalf, and if he had done so the result might be otherwise." If you have oral argument as a right to everybody, they are certainly going to use it. If you allot one hour to each case that will give you an idea of the time to be consumed. So there are cases that can be disposed of with perfect justice without hearing any argument.

I always liked to rest my case on a brief when I was practicing law. If I could not put it down on paper in plain, concise language sufficient to impress the judge, I knew I was not going to impress him when I got up there to talk face to face. I remember one landmark case that I happened to be counsel on in about 1961 or 1962 where we completely changed the law of the United States on contingent fees for informers. I was representing the defendant. The fifth circuit reversed the conviction. I filed a brief. I did not go to oral argument at all.

But I do think maybe after sitting here and listening yesterday—and from what I have heard here—maybe we could use procedures where oral argument is denied by giving reasons why it is denied and

that would let the people know why we had not taken their time or expense to come to court to make an oral presentation.

Now, so far as the Rule 21 cases are concerned, where we say affirmed without further comment, that has been the practice in the Supreme Court of Mississippi for over 50 years. I have taken appeals to the Supreme Court of Mississippi—of course, we have always had oral argument and still do, but when they came down with an opinion “per curiam affirmed,” no comment, I knew the judges thought I had not brought a very good appeal. I did not need any further elaboration.

Actually, when a lawyer gets an opinion from the fifth circuit, maybe 50 pages long, all he looks at first is to see how it came out, what are the results, what happened to me. If he lost, why, the reasons do not really make any difference, you know. But the reasons do make a lot of difference when you are setting precedents, laying out guidance for future cases, and there are many cases in which there should be written opinions.

I believe last year we produced over 100 opinions per judge, per curiam or signed, and I think the closest thing to it anywhere in the United States was maybe 60 in some other circuit. Writing for the sake of writing is not helping anything. I am appalled by the fact, really, that when I got on the fifth circuit in 1965 we were at only about volume 350 Federal 2d in the Federal reporter system, and now, in that 9 years, we are up past volume 500. In 9 years we have produced over 150 volumes of Federal reports, just from the courts of appeal.

Senator BURDICK. Not only that, but the size of the books is increasing, and the cost is getting more and more expensive.

Judge COLEMAN. Not only that, but when you try to study something to find out what has to be done with it, you have a haystack to work yourself through, and much of it is repetitive.

So, I think judging is an art instead of a science, and if a man puts himself in a lawyer's shoes—and all judges have been lawyers—we can take care of those problems all right.

Senator BURDICK. You have put your finger on one very important facet here. You say that a lawyer for a criminal, just to protect himself, has to appeal, regardless of merit as to his client, and if he goes through with an appeal without merit, there has to be some way to dispose of that.

Judge COLEMAN. Well, sir, it worries me that a lawyer is expected to file an appeal that he knows has no merit. That leaves me with a feeling that the profession is being prostituted, for lack of a better word. A lawyer is supposed to be specially trained, and he is supposed to know what is best for his client. Presumably, that is what the Constitution guarantees in the right to counsel. I have sat down with many a man and said, “Now, we could appeal. We can delay matters with many appeals, as you well know. We can do this, we can do that.” But I never did think it helped my professional reputation to file appeals only to lose them. It certainly does not help a man who is faced with serving a term in prison to let him think he might get out when you know good and well he is not going to get out, for one day down comes the decision, and he is no better off than he would have been without an appeal. I think the law has slipped into a status where, if the fifth circuit affirms a man's conviction, then he has to be informed, and, if

he wants it done, the lawyer has to file a petition for certiorari for him. That is the law, and I am going to follow the law as far as I know how, but it seems to me that is "using a lawyer," I guess, for lack of a better term.

Senator BURDICK. Well, now, you said a moment ago that you oppose the elimination of these oral arguments to the extent they are now eliminated. Have you come to the point where you believe they have merit, providing, of course, one judge out of the three assigned to the case has a right to demand oral argument?

Judge COLEMAN. Well, I would hope, Senator Burdick, if Congress allowed these circuits to be realigned, we could then take a fresh look at the whole thing. I know there are cases that ought not to be argued under any circumstances, and I would adhere to that view. On the other hand, our present system is that these cases come down by numerical rote. No judge knows what he is going to get. Nobody else knows what he is going to get. We have a calendar judge who sets up a calendar without knowing who is going to sit, and the chief judge constitutes a calendar. That is to preserve impartiality and all that.

Take the screening procedure. I do my own screening. I do not leave it up to my law clerks. Law clerks are very helpful people, and it would be very hard to get along without them, but I also think it is useless to expect a man fresh out of law school to do with these things what a judge would do with the appropriate experience under his belt. Therefore, I do my own screening. I look at it and I see very quickly, sometimes, that a case deserves an hour's argument. All I do is check the folder and send it back to the clerk and it goes to the oral argument calendar. In other cases, they do not merit oral argument. At the present time, I am on the screening panel of Judges Dyer and Roney. We change panels every year, or thereabouts. I send a case to Judge Dyer, and if he agrees, it goes to Judge Roney. Then it comes back to me and I prepare the per curiam or whatever. We do not decide anything on a summary calendar unless it is just so open and shut that there is no room for argument about it.

Well, with all of that, in the time we spend doing those things I think we could hear a lot of argument. Say you allow a man 20 minutes to argue, you will spend that much on the screening. So, I would hope, if we get the circuits divided, we would not be standing under a mountain all the time and we could go back and largely reinvigorate oral argument, or at least grant oral argument in all of the cases where, if I were the lawyer, I would say, "I sure would like to talk to the judge for 15 minutes about this one."

Senator BURDICK. Yesterday we heard testimony from Judges Brown and Wisdom that we would have to split the circuits again in the future, and this could go on and on and on. My question is: As long as one member of the panel to which the case has been assigned, after he has read the briefs, asks for an oral argument, is that not sufficient?

Judge COLEMAN. That is the present situation, Senator Burdick. Any one of the three can put it on the oral argument calendar, and we do. If we agree it does not deserve it, we still have to agree on what is done with it. Sometimes at that point we disagree. Then it goes to the oral argument calendar. So that is a safeguard, I think.

I must say that, in all candor, I do not know of any injustices that have been caused by the summary calendar procedure.

By the same token, of course, the lawyers now who appeared before Senator Hruska and Mr. Westphal and others in Jackson, complained about limiting oral argument. My own propensity, as I have just indicated, would be to give them all we can, as far as we can without just wasting judicial time. It costs the United States a lot of money to have these cases decided. When you think about the judicial salaries and the cost of supporting personnel and travel and all that, there is no telling what each case costs.

Senator BURDICK. Well, I can give you one experience. I'll just take another minute or two here. In the first case I had as a young lawyer, I did it in a hurry; I proved it up in about 5 or 10 minutes and went to the back of the courtroom. Just as I was leaving the courtroom, one of the older lawyers tapped me on the shoulder and said, "Not a very good job, young man." And I said, "What is the matter; didn't I do it right?" He said, "Yes, sir, but take more time, take more time."

Judge COLEMAN. "Do not make it look too simple."

Senator BURDICK. I am just wondering if all these appeals are not for that same purpose.

Judge COLEMAN. Well, I just wish it were possible for all of the Senators and Congressmen—it is not possible under the separation of powers—but I wish it were possible for them to sit with us and see these problems for themselves. We can find out what you are doing. We can read the Congressional Record, keep up with every word that is said, keep up with the committee reports, and read the papers, but I wish it were possible for the lawmakers of this country to be able to sit with the court just for 2 or 3 days—especially the lawyer members; it may not be of much interest to those who are not lawyers—and I am sure it would be as revealing to them as it was to me when I first got to the court, even though I had had other judicial experience.

Senator BURDICK. Are there other procedures that you would recommend that might prevent what Judge Wisdom and Judge Brown fear might happen in a few years? Do you have any other suggestions for saving the judges' time?

Judge COLEMAN. Well, predictions are a very, very dangerous exercise. It is not given to anybody to foretell the future. But on the other hand, I have every confidence, based upon my past 9 years on the court—I was there when we had 9; I was there when they brought in 13; I was there when they brought in 15—I have every conviction that 9 men on a court can keep it going and can do a good job, and I just do not see this proliferation that they see.

Now, the point was made yesterday by Mr. Westphal that maybe we need 11. I would not quarrel too much with that, but I would like to see us start off with 9 and, if it does not get the job done in an appropriate judicial manner, we can always come back to you and say we need two more.

Our present court of 15 members formally passed a resolution. The Administrative Office was circulating the news that we needed 22 judges on the fifth circuit and we all knew we had reached the point of no return when it comes to running a court instead of a convention. We passed this resolution unanimously. We do not need any more

judges. We do not need more than 15. I think that after you pass the number 11 the more you go up, the more you slow down. You have more people involved. You have more people you have to pass by. Our en banc conferences, for example—you heard a great deal about that yesterday. There is a rule, of course, that when you are in conference you start at the end of the table and go all the way around. No judge can be stopped. There is no way you can shut a judge off when he is stating his views on a case. With 15 we can just barely get it done. Then you have to vote back up the line.

I think that after we passed 11, Senator, we slowed things down instead of speeding them up.

Senator BURDICK. That seems to be the impression that I get from the testimony. You soon reach the point of diminishing returns.

Judge COLEMAN. Yes, sir.

Senator BURDICK. Any questions?

Mr. WESTPHAL. I have a few, Mr. Chairman.

Judge, you commented that, when a lawyer gets the opinion from the Appellate Court, the first thing he looks at is that last page, to see whether it is affirmed or reversed. You indicated that it usually does not make much difference what the court said.

Judge COLEMAN. Not to him.

Mr. WESTPHAL. Well, I think if he loses, it makes a great deal of difference. If he wins, it does not make much difference; but if he loses that judgment, he has to explain to his client.

Judge COLEMAN. I have opened those envelopes many times with my heart in my throat.

Mr. WESTPHAL. You mentioned, Judge, that, if there is to be an eastern four-State circuit, it should be headquartered at Atlanta?

Judge COLEMAN. I say that is a possibility, of course.

Mr. WESTPHAL. Of course, Atlanta would be approximately at the center geographically. Are there any other places where you think that court should be authorized to sit—not simply to satisfy local pride—but to lend some efficiency to court operations, in the sense that you could calendar a group of cases from a certain part of the circuit in one place and a panel could go there, instead of having all counsel come to panels in Atlanta? What are your views on that?

Judge COLEMAN. That is a very important question and there are many facets to it. Unfortunately, under our present setup, I have seen lawyers, because that is the way the calendar fell, travel from El Paso to Atlanta or Jacksonville to argue a case, while at the same time somebody in Atlanta was going to New Orleans. I remember one time in Atlanta the Assistant Attorney General of Georgia had a case on our calendar. We called the calendar and she did not respond, and we found out she had gone to New Orleans. She had gone to the wrong place.

Of course, you have the expense item involved, too. It is all a matter of good sound judgment and good practical administration.

Now, I myself would like to see the court sit in every State.

If I am not trespassing too much on your time, I want to give a very impressive example. The fifth circuit had never sat in Jackson, Miss., when I was appointed to the court. We had plenty of business from Mississippi, but the judges were not sitting in Mississippi. I asked the judges, "why do you sit in all of the other five States, but not in

Mississippi?" They said, "Well, we have never been asked to sit in Jackson, Miss." I said, "Well, I am asking you now. I think it would be good for the public upon whose lives you have such a heavy impact, to see you and hear you." They said, "We will do it." They came. We went up and called upon the Supreme Court of Mississippi in a body. They came down the next day and called upon us. There was some State-Federal cooperation and community of spirit there that, in my opinion, did a lot of good for the cause of justice.

So I would say that where we sit should be left to the judicial council once we are organized. We should leave it to the members of the judicial council to determine that based on all they know. Although I mentioned Atlanta a while ago, I personally do not care where you put the headquarters. What I want is a court where we can get out from under some of this terrific caseload and have a little time to reflect, think, study, and maybe take a second look at cases we do not have time to take second looks at now.

Mr. WESTPHAL. You have suggested that Atlanta would be the principal headquarters of that new court, but you think the other places where they sit should be left to the discretion of the council. I think it is customary for the Congress to write into the creating legislation the places in which the court is authorized to sit, always giving the court discretionary power to sit wherever the exigencies of a particular situation may from time to time require. I take it, your feeling is that a court should sit in practically every State in a circuit?

Judge COLEMAN. The statute under which we operate says we shall hold one term in Montgomery, Ala., one in Fort Worth, Tex., and one in New Orleans. We have not been holding those terms in Fort Worth and Montgomery. There has not been a necessity for it. The chief judge knows some procedure through which he can eliminate such sittings.

We have sat frequently and regularly in Houston, Tex., ever since I have been on this court. Until the last year or so there was not anything in the statute about doing that. I think the statute as presently drawn, says, "and such other places as the council may direct." I am not, however, certain of that.

Mr. WESTPHAL. Has the existing circuit ever sat in Florida?

Judge COLEMAN. Yes, sir, we have, at Jacksonville. We sit there regularly. I am going to be sitting in Jacksonville in about the third sitting from now.

Mr. WESTPHAL. If the new circuit is formed, should Jacksonville be an authorized place?

Judge COLEMAN. I would rather see what the circuit judges from Florida say about that. They know more about the facilities and so forth and so on.

Mr. WESTPHAL. Florida generated, last year, 600 appeals which would be by far the largest volume of appeals originating from any of the four States.

Judge COLEMAN. Yes, sir.

Mr. WESTPHAL. I assume that a good share of those appeals come from the southern or middle districts of Florida?

Judge COLEMAN. I believe you only have about—you have the figures before you, I am sure—but you only have a very small number from the northern district of Florida—from Pensacola and Tallahassee—and then a pretty good bunch from the middle district—Jack-

sonville, Orlando, or Tampa—and a great many from the southern district. That is why I thought, if the committee is interested, I am sure Judges Dyer, Simpson, and Roney would be willing to state their views. I just do not feel qualified to say what ought to be done about Florida.

Mr. WESTPHAL. On the other hand, it has been suggested that there is a great deal more efficiency in a court of appeals—that is, efficiency insofar as conservation of judge time—if the judges of that court are all headquartered at the principal place where the circuit holds court. The second circuit, because of its favorable geography, in fact operates that way. The seventh circuit is now at the point where all of its judges live in Chicago and its suburbs. But in most of the other circuits, even though the court may sit in one principal place, such as the eighth circuit sitting in St. Louis, nevertheless, once they get through with sittings the judges scatter back to their own home States. Now, do you have any particular views on the possibility of having all hearings held only at the headquarters of the court? I understand the fifth circuit in the last two calendar years, I believe, has tried having all panels sit in New Orleans at substantially the same period of time. What views do you have on that issue?

Judge COLEMAN. We have been trying to sit in New Orleans most of the time deliberately because the building has been refurbished and redone, and all the judges have individual chambers there where they can work and so on.

Generally, we start a session on Monday morning. I drive down on Sunday afternoon. The court adjourns on Friday, say at 2 o'clock, and I am home by dark. I do not think that presents any real problem.

Mr. WESTPHAL. If the judges live further from New Orleans it is a different matter.

Judge COLEMAN. Well, those who live farthest away, of course, will probably get on a plane and be there more quickly than I can get to Ackerman in an automobile. You can fly to New Orleans pretty quickly in the fifth circuit.

Mr. WESTPHAL. You say that there is a new Federal courthouse—or at least a new Federal building with facilities in it for the courts—being built in Atlanta. Do you, or Mr. Reese, the circuit executive who is present in the hearing room, happen to know how far along that construction is? Have they actually started construction of the building?

Judge COLEMAN. No, sir, Judge Griffin Bell would know about that, of course, because he lives in Atlanta. I understand that the Congress has authorized it and funded it. Now, how far along it is I do not know, but it is being built where the old Union Station used to be.

Mr. Reese informs me that construction has not started on it yet.

Mr. WESTPHAL. Well, it would help if we knew just what stage we are at. If a circuit court is going to be headquartered in that facility, and if that facility is still on the drawing board, so to speak, there may be the opportunity for GSA to make some changes in the plan, so that the facilities that are erected will be appropriate for use by the circuit court, especially one which would have nine judges, and especially if those nine judges were ultimately to have their official chambers in Atlanta. I think my question is, "how far along is that Atlanta

building?" On the drawing—do you have any information on that?

Judge COLEMAN. Perhaps Mr. Reese can answer that.

Mr. REESE. Mr. Westphal, as I understand it, the plans have been completed for a new Federal building. Those plans, architectural drawings, are in the hands of the General Services Administration. The plans provide for courtrooms for a circuit court of appeals and for chambers for the judges of such a court.

Mr. WESTPHAL. How many courtrooms and how many chambers? Do you have an idea?

Mr. REESE. No, I could only estimate. I can provide that information later.

Mr. WESTPHAL. Could you provide that in letter form, addressed to the committee? We will need to know how many courtrooms are provided, whether any of the courtrooms are of such size that they would be used for en banc purposes by a bench of 9 or 11, and how many chambers are contemplated in that structure. We would also be interested in knowing whether they have put the contract out for bids, and whether they have accepted any bids—in other words, at just what stage is GSA now and what is their timetable for putting it out on bids, if they have not already done so. This all becomes of some concern, because if the circuit court does not have proper facilities it labors under a handicap that we certainly would not want to impose on anybody.

Judge COLEMAN. I think, from what I have heard, that I would like to suggest, if it is agreeable to you, that Mr. Reese be asked to confer with Judge Griffin Bell about this, because he is the resident circuit judge in active service at Atlanta. I think I have heard Judge Bell say that this is to be a 33-story building at the site of the old Union Station, which has since been abandoned, that it would have more adequate space for the court of appeals, if there were to be a new circuit. But if you wish, I am sure Judge Bell would be glad to write you about that.

Mr. WESTPHAL. It would perhaps be more convenient if Mr. Reese could act as the intermediary and furnish that information. The reason I am making that request, rather than having the subcommittee staff try to get that information directly from GSA, is that I understand it is customary for GSA to consult the local representatives of the judicial branch if they are planning any judicial facilities.

Mr. REESE. I will be happy to do so, Mr. Westphal.

Mr. WESTPHAL. Thank you.

[The requested information is contained in the letter of November 5, 1974, which follows:]

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
New Orleans, La., November 5, 1974.

Mr. WILLIAM P. WESTPHAL,

Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR MR. WESTPHAL: When the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate was hearing testimony, from several of the active judges of this Circuit, on the problem of circuit realignment, I was present in the hearing room and was requested to furnish the Subcommittee a current status report on the court of appeals facilities now available and those planned for the new U.S. Courthouse in Atlanta, Georgia. There follows the information you requested.

FACILITIES NOW AVAILABLE

One courtroom with a three-judge bench (also used by the district court),
Two resident judges' suites, and
Two non-resident judges' suites.

FACILITIES PLANNED

One large courtroom with a 15-judge bench,
Two regular courtrooms, each with three-judge bench,
Two resident judges' suites,
Eight non-resident judges' suites,
A central library,
Two judges' conference rooms,
Court clerk's space,
Expansion space for five non-resident judges' suites, and
Expansion space for the court clerk.

STATUS OF FACILITIES PLANNED

Plans and specifications were completed in July 1974. Construction bids can be solicited by the General Services Administration (GSA) as soon as current funding problems are resolved. As originally approved by Congress, GSA was authorized to spend about 27 million dollars. It is now estimated that the cost will be in excess of 60 million dollars and it will be necessary for Congress to authorize a higher cost limitation before a construction contract may be awarded.

The site has been selected and GSA has an option to purchase it.

SUMMARY

In summary, adequate facilities for a court of appeals headquarters are planned in the new building in Atlanta. If Atlanta is established as a headquarters point before the new building is completed, sufficient space is available in the current building to satisfy an interim operation.

Hopefully, this gives you the desired information; if not, however, please let me know what else you wish to have.

With kind regards, I am

Sincerely,

THOMAS H. REESE.

Mr. WESTPHAL. Judge Coleman, I have no desire to run through the complete questioning that I posed to Judge Gewin yesterday—I believe you were present in the hearing room and heard that—but I am just a little bit troubled by your assertion, early in your testimony, that it would not be necessary to appoint more judges, because those four States would already have their nine. You later modified that to say that you really do not have any objection to 10 or 11, but you thought you would like to start with 9 because you could always ask Congress to authorize more if 9 could not handle it. I believe that is a fair summary of what you said, isn't it?

Judge COLEMAN. Yes, sir, that is right.

Mr. WESTPHAL. Now, this is a matter of some concern in the subcommittee's consideration of this problem concerning the fifth circuit, because, as of June 30, 1974, the fifth circuit had pending 2,310 cases, which is almost a full year's filings. Other studies indicate that, on the average, for a case which receives the full-blown treatment of oral argument and a full signed opinion, it takes an average of 349 days from the date the notice of appeal is filed until the opinion is released.

Judge COLEMAN. What are the statistics between the time the case is ready for our consideration and the time it is decided?

Mr. WESTPHAL. 189 days.

Judge COLEMAN. Between the time it is ready and decided?

MR. WESTPHAL. Yes; between the time the last brief is filed and the case is decided by the court. I am talking now about a case that is decided by a full-blown signed opinion after oral argument. From the time counsel have completed their work—getting that last brief and everything filed—to the day an opinion emanates from the fifth circuit court takes an average of 189 days, which is a considerable period of time, on the average, when we compare it to some circuits that do not have the problems of such overwhelming caseloads. I mean this as no criticism of the effort made by your 15 judges.

Judge COLEMAN. I understand.

MR. WESTPHAL. I am just mentioning that as a circumstance. But the subcommittee would like to see you have sufficient manpower and resources so that these time factors can be shortened somewhat.

Judge COLEMAN. I strongly suspect that if a real study were made it would be found out that a great many of these 189 days are due to the extremely large number of judges who have to participate in what finally becomes a final judgment, because you nearly always get a petition for rehearing en banc. Then that has to be circulated and all that.

MR. WESTPHAL. This would not include any time consumed——

Judge COLEMAN. This is just from the time the first opinion comes down.

MR. WESTPHAL. In any event, the point of my question is this. The fifth circuit now has a pending caseload of 2,300 cases. Were we to come up with a new circuit, that new circuit for four States would have 53 percent of the new filings, so, I am just assuming that they would also get 53 percent of the pending cases. You would then have a considerable number of pending cases, not all of which can be regarded as a backlog, of course. So I just have some doubt in my mind—as we get into a refined statistical analysis related to the workload of the nine judges in a four-State circuit, whether we may not come to the conclusion that, in order to give that new circuit, not only a fighting chance to keep up with the current incoming cases, but also a chance to whittle down their so-called backlog and eventually achieve some better timeframe on this overall time from notice of appeal to when the opinion comes out, or from last brief to when the opinion comes out—I am just wondering whether you may not have to start out with 10 or 11 judges in order to have that opportunity.

Judge COLEMAN. Well, I should think we ought to start with an uneven number, either 9 or 11. I am not here to oppose the number 11. If you have 10, you are likely to wind up with a lot of district judges being affirmed by an evenly divided court, which does not even write an opinion and, therefore, the whole thing remains a mystery.

Not being a chief judge of the court, I am not too much involved in these various and sundry statistical mechanics and operations. I have been trying to get my opinions written. I will say that, at this time, I have no opinions assigned to me that have not been written and filed; I am ready to start a new court year with a clean desk. I go to my office every Saturday all day, most of the time on Sunday afternoons, and also at night after supper. That does not bother me. I grew up on the farm. I am just foolish enough to like work, and being a judge is just like being anything else; it has its difficulties and you have to meet them.

But there is one matter which is something of a mystery to me. We have the States of West Virginia, Maryland, Virginia, North Carolina, and South Carolina—pretty good States, I would think—which are operating in the fourth circuit with only seven judges. Now, how many States is that?

Senator BURDICK. I would like to verify, at this point, your opinion. Based upon the caseload that you have now, if we split the fifth circuit to the east and west of the river, you believe that you are going to handle that with nine judges?

Judge COLEMAN. I believe that, sir. I would not be at all opposed to putting 11 judges on if the committee, in its wisdom, sees fit to do that.

Senator BURDICK. This is your opinion?

Judge COLEMAN. Yes; my opinion is that nine can do it. I also have the opinion, based on past experience, that if you start off with 11, it will be just that much sooner that you are met with the argument that you should have 13. If 9 horses will pull the wagon easily, 13 will pull it more easily.

Mr. WESTPHAL. I have no more questions.

Judge COLEMAN. Thank you very much.

Senator BURDICK. Thank you very much, Judge.

Judge COLEMAN. Thank you.

Senator BURDICK. Our next witness is Judge Clark.

STATEMENT OF JUDGE CHARLES CLARK, FIFTH CIRCUIT, JACKSON, MISS.

Judge CLARK. Thank you, sir.

Senator BURDICK. I just want to let you know that Senator Hruska had an engagement with the Appropriations Committee. He wanted me to express to you that he is sorry that he could not be here to hear your testimony, but he will read the printed transcript.

Judge CLARK. Thank you, sir.

Mr. Chairman, I, as Judge Coleman, have a prepared statement and then I will be glad to answer any questions that are generated by that or that may be directed to me.

Others have spoken to the do-or-do-not-divide issue. My remarks are limited to the placement of the State of Mississippi if this committee decides that this circuit should be divided. I favor a location of Mississippi into a circuit with Alabama, Georgia, and Florida. The report of the Commission on Revision of the Federal Court Appellate System in December 1973 defined several important criteria. My prepared remarks are really directed totally to that report.

The first of the five criteria that your Commission thought should be controlling was that, where practical, circuits should be composed of at least three States, but in no event just one. Since Texas is geographically a single State, the Commission recommended that Mississippi and Louisiana be joined with it into a western circuit; however, Texas cannot properly be regarded as a single State in any real judicial or political sense. Its area is greater than the rest of the States of the fifth circuit combined. Its population approximates that of four of the other five States in its total number, and the population mix contains Indian, Negro, and Mexican-American ethnic groups, all of

significant size. It encompasses vast agricultural and industrial enterprises, and has seaports and an international border. It generates today more cases than Alabama, Georgia, and Mississippi combined. Only in the sense of its constitutionally limited representation in the U.S. Senate can it be said to be on a par with the other States in the fifth circuit.

The second criterion which the Commission weighed was that circuits should not immediately require more than nine active judges, but since the time of the Commission's recommendations, filings in the fifth circuit have increased 11 percent. Thus, if the maximum new judge power of nine per court were assigned to both sections of a divided fifth circuit, the average caseload of the two divisions already would be well above the national average which the Commission's report thought was a goal that should be sought to be achieved.

However, if five new judgeships, to make a total of 11 judges, were assigned to a circuit comprised of Texas, Louisiana, and the Canal Zone, today's caseload would be safely below the figure that the Commission thought was desirable, and if two additional judgeships for a total of 11 were assigned to the other side of the division the caseload there would also be below the national average.

The third consideration that your Commission advanced was the national character of the resulting circuits. It was recommended that, to the extent practicable, the circuits contain States with a diversity of population, legal, and socioeconomic interests. It is in this area that the placement of Mississippi with the States to the east shows most favorably. Mississippi shares the mighty river, from which it takes its name, with Louisiana. Only if Mississippi is included in an eastern circuit could the river's regular generation of its unique admiralty litigation be added to the eastern circuit.

Mississippi is also fortunate enough to enjoy a very substantial oil and gas production and a refining industry within its borders. While both Texas and Louisiana lead Mississippi in the size of these industries, the assignment of Mississippi to the eastern circuit would be necessary to bring any significant amount of oil and gas related litigation to that circuit. On the other hand, the placement of Mississippi into a western circuit with Texas and Louisiana could add no significant dimension that the Commission sought to obtain. It would only add volume.

The fourth and fifth considerations of the Commission, which were marginal interference and the inclusion of noncontiguous States, are not pertinent to any proposed division that would be made of the fifth circuit within itself.

Because past experience has shown it to be a far more accurate barometer of judicial forecasts than the Administrative Office figures used by the Commission, our clerk maintains his record of filings, which does not separately count cross appeals and which includes the actual number of agency review cases assigned to the States where the cases originate, rather than projecting the estimate of such cases based on an overall percentage. When the current, more accurate figures of the fifth circuit are used, they show that dividing the present circuit between Mississippi and Louisiana would result in the best possible balance for now and also for the future. The difference in appellate filings today would be less than 2 percent, and the faster

growing western side of the division would eliminate this difference in the immediate future.

As Judge Coleman has so aptly put it, Mississippi has a historical kinship with Alabama, Georgia, and Florida. It has a particularly close affinity with Alabama, its mirror-image twin, which not only is rooted in the past, but is also cemented into the foreseeable future. The U.S. Corps of Engineers is presently constructing a gigantic water highway which angles across the border between Alabama and Mississippi. The tremendous volume of commerce which will continuously flow up and down this important artery should not be served by two separate circuits.

A division of States within its existing boundaries is the most plausible means of relieving the debilitating workload of the fifth circuit. Mississippi, the pivotal State in any circuit split, desires to be placed with those States from which it was created. Happily a line drawn at the river between Mississippi and Louisiana is the most equitable means of equalizing the judicial workload between the two resulting divisions.

I would add this. I share Judge Coleman's views that the nine men who currently occupy the judgeships that are already authorized for the States of Alabama, Mississippi, Georgia, and Florida, could, in my opinion, very adequately handle the present caseload that originates in those States. Also, like Judge Coleman, I have no objection whatsoever to an increase in the court's size to 11 judges. There does come a point in working with a large number of other judges on en banc court matters, and other general court matters, when the number ceases to give the court the efficiency and ability to dispose of extra appeals. We think we have reached that point of saturation—or perhaps even supersaturation—at 15 in the fifth circuit, but I see no reason why 11 judges would not give us added judge power and not be so burdensome in total number that they would cut down on the efficiency of the court.

In short, I am of the opinion that 9 could handle the workload to begin with, but I do not object to 11.

Senator BURDICK. Do you think 9 could do it presently?

Judge CLARK. Yes, sir.

Senator BURDICK. Judge, do you have any suggestions for different procedures that might be adopted by the courts that would ease the burden somewhat? We have had reference here in testimony in the last few days to screening processes, the limitation of oral arguments and things of that nature, so that more cases could be handled by the judges.

Judge CLARK. Senator, I know of nothing that can be done that is not presently being done in the fifth circuit. I am sure the committee knows what our procedures are now, the use of opinions that contain no reasoning, but which are definitive and known to the bar to be assigned to a category of cases controlled by existing precedent and in which an opinion would be of no value other than to the party's litigant to explain the court's reasoning.

We also eliminate oral argument in about—well, more than 55 percent of the cases presently filed with us. But this must be a completely unanimous procedure by the panel of judges assigned to hear that case.

I know of nothing else significant that could be done.

Senator BURDICK. What about law clerks?

Judge CLARK. Personally, we are at the saturation point in my office. We have three law clerks because I have opted for that procedure over two clerks and two secretaries. We are having some difficulty in the stenographic department, and I am very seriously considering going back to the opposite balance which is not good, either. I tried two secretaries and two law clerks for a while, and it is heavy on the secretarial side. But these clerks have a maximum potential for input to a single brain. It may be the size of my brain that is the problem in my office, but I do not believe I could keep more than three clerks productively occupied.

Now, our central staff is something that we hope will offer us some new potential. We cannot realize the full value of that office yet because we do not have a staff director that we think is of the caliber to supervise the work of those people. We have just been unable to hire a person at the level authorized by the Congress to date. We are hoping that Congress will see fit to appropriate a sufficient amount for that chief staff law clerk's position to enable us to have an attorney widely experienced and well versed in the law, who can manage that office to make it more productive. This could then give us input that could possibly help with the workload.

Senator BURDICK. It seems generally agreed that, once you pass nine judges, you are getting to an efficiency impasse; is that correct?

Judge CLARK. I agree with that, sir.

Senator BURDICK. Staff may have some questions.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Judge Clark, Judge Wisdom appeared here yesterday, and I am sure you know, basically, what views he expressed to this committee on this issue. One of the things that he put rather heavy emphasis on was the fact that he implored the Congress to do something about curtailing the input into the Federal court system. Various people will have various reactions to such a suggestion, but inevitably, involved with such a consideration, is the question of whether, in attempting to do so, you are curtailing the legal rights of anybody whose case is thereby denied Federal court jurisdiction. It seems to me, from the statistics that have been presented for the subcommittee's consideration, which document the growth in judicial business ever since the end of World War II, that—whether Congress splits the fifth circuit or does not split the fifth circuit, whether it splits the ninth circuit or does not split the ninth circuit—eventually it is going to have to give some consideration to the feasibility of at least a moderate curtailment of input, simply because these courts, no matter how reorganized or reshuffled, will eventually again become swamped. Do you have any particular views on that point as it relates to what the caseload will be for a four-State circuit and how nine judges—or whatever number of judges—can possibly handle that incoming caseload plus reduce the backlog, as I discussed with Judge Coleman? I would be interested in whatever views you have on that.

Judge CLARK. Let me compose my thoughts just a little bit into categories. In the first place, I agree entirely with the thesis that Judge Wisdom advances. The splitting of the fifth circuit is to my mind an expedient, albeit a necessary expedient. I do not share his views in opposition to the splitting of the fifth circuit.

If I may use an analogy that perhaps is not too good, if a man gets the terrible news that he is diagnosed to have cancer, he can curse the surgeon or submit to the surgery in the hopes that it will correct the condition. I do not think that division of circuits, proliferation of circuits, is the answer to the Federal judicial problem. I do believe curtailment of jurisdiction is essential for the long-range solution. I am convinced that, if you do not divide the fifth circuit right now, justice will suffer. Now, where the suffering will come all depends on whose case does not get heard or whose case does not get sufficient attention. I do not think there is a judge in our circuit that lets a case go out of his office that he believes is unjustly decided or does not receive enough attention. But this is always an individual matter, and somewhere along the line, with the press of business, we will either be unable to reach a case in time to do justice or we are going to let cases out of the chute that really are not ready to be released for their precedential value or their effect on the litigants.

Furthermore, and maybe more fundamentally, I believe that the continued proliferation of Federal jurisdiction is harmful to our federalism. The States have, in every case in the fifth circuit, splendid court systems. I do not mention Mississippi as an outstanding example, but I do not say that Mississippi is anything less than a State whose courts accord justice to the litigants before them in every case. I think that the States would respond magnificently to additional challenges, to support the load of deciding cases, deciding controversies between people, in a peaceful way.

I personally agree with Judge Wisdom that diversity jurisdiction has served its purpose. In the days when the entire country was provincial, diversity jurisdiction allowed people to see the bigger picture, to keep pettiness from deciding cases with out-of-State persons and with large corporations. But that day is gone now. People in even the most rural sections of my State, and of other States in my circuit, understand that fairness is the guide for court systems, not whether the plaintiff is your neighbor or whether the defendant is your neighbor. I think that the Congress should be very careful in adding new areas of jurisdiction to the Federal courts, and I think that it should look carefully at areas where it can curtail already existing jurisdiction if it wants to solve the ongoing problem of the management of a court system.

Senator BURDICK. Judge, I would like to respond to what you have said about diversity jurisdiction.

I have been for some time now the author of a bill, which was sponsored principally by the American Law Institute, and do you know that I have not received an endorsement from a single bar association in the country?

Judge CLARK. Senator, I did not know that——

Senator BURDICK. The lawyers thought it was useless for some reason.

Judge CLARK. I will say this. I came to Washington with the president of our State bar association, who will be before you in a minute, and I am sure that he will advise you that that is not the widely held opinion of the Mississippi bar, either.

Senator BURDICK. I would be just delighted to have a resolution from you. It is a modest proposal at best, too.

Judge CLARK. Yes, sir. It is not a full abolishment. I just say that I entertain that opinion myself. Of course, the abolishment of diversity jurisdiction in the fifth circuit's case would probably only save us about 10 percent of our workload. It is not going to be the complete answer. But I think that we have got to look for ways to curtail the jurisdiction of the Federal courts in many areas.

Senator BURDICK. I think one of the reasons that the statistics in the Administrative Office show a leveling off in the district courts is that there has been some relief in sight. For example: Selective Service cases are no longer coming in; we passed a bill that would eliminate or reduce the number of lawsuits in cases involving vessels on the high seas; and no-fault insurance may be on the horizon, which would eliminate a lot of personal injury cases. So there is a little help coming over the hill, perhaps.

Judge CLARK. Yes, sir. We welcome it. At the same time, we get the Occupational Safety and Health Act bringing us new cases every day and NEPA, the National Environmental Protection Agency, generates environmental protection cases. These are both very difficult areas because they are precedential and they have to be very carefully structured.

Senator BURDICK. After some case law and after precedents are established, they will not be as great a problem.

Judge CLARK. Yes, sir.

Mr. WESTPHAL. In addition to curtailing input by changing existing jurisdiction, there is the matter of, as you pointed out, seeing that not too much additional workload is imposed on the Federal system. I am referring to the so-called impact theory the Chief Justice of the U.S. Supreme Court is quite interested in. As long as the subject has come up, I thought I would mention, for the sake of the record, that the chairman of this subcommittee has been particularly instrumental in trying to watch for those things in this past Congress. Efforts were made to throw some 26,000 National Labor Relations Board "unfair labor practice" cases into the district courts, taking them completely out of the hands of the General Counsel of the Labor Relations Board. Had that legislation passed, the district courts would be inundated with cases of that kind. There are various examples that I could cite, but the point is, whether circuits are split or not, there must be some further effort to try to curtail Federal jurisdiction that is not necessary for the resolution of individual rights. Do you agree?

Judge CLARK. Yes; I do agree.

May I note one thing here? This was not commented on earlier because it slipped my mind. The insertion of agency review at the appellate level has advantages because it tends to bring it to a close more quickly, but that has a number of disadvantages as far as the court of appeals is concerned. We get reviews from the NLRB directly into our court. It never goes to a district court, and the number of cases that would naturally fall out there are not saved to us at the appellate level. Certainly it would be a shifting of burdens, because the district courts would have to move in and pick these up, but we would get a lot fewer labor cases appealed if that were not so. The same is true of Federal power reviews and other reviews. They are in-

sorted into the system at the appellate level, which is an unusual procedure.

Mr. WESTPHAL. There is one more point here that I would like to make. You will recall that at the public hearing held by the Commission on the Revision of the Federal Court Appellate System, the so-called Hruska Commission, you brought a bit of demonstrative evidence into the hearing room. I suggested that you do not go to the trouble of bringing that demonstrative evidence here to Washington, but I have just now been reviewing the record of the hearing there at Jackson. If your memory can supply the exact figures and statistics I will be happy to have you do so, otherwise, I will refresh your recollection from what I have gleaned from the transcript of that hearing.

You will recall that you brought into the hearing room at Jackson the printed slip opinions which came from the 15 judges of the Fifth Circuit Court of Appeals during a particular fiscal year, and you piled those slip opinions one on top of the other on the hearing table. They measured 51½ inches high, which is not quite as high as Dr. Elliot's shelf of books, but it nevertheless is 4 feet 3½ inches of slip opinions. Do you recall that one demonstrative bit of evidence that you produced at that hearing?

Judge CLARK. Yes, sir.

Mr. WESTPHAL. I think in producing that you made the comment that, on a bench of 15 judges, if you want them to be well informed on the work that was being done by all judges of that court, you are compelled either to read—or at least to review—material contained in that 51½ inches of slip opinions sometime during the course of the year.

Your second bit of demonstrative evidence was the assembly of a stack of printed slip opinions that represented the end work product of just those cases in which you participated as one of the judges of the three-judge panel. They included, also, those cases in which you were acting as a judge sitting en banc. That pile of slip opinions came to 1 foot in height. I mention that because I think that that is a pretty good capsule indication of the problems that are brought about by a court having the volume of business that the present fifth circuit does have and the problems which individual judges on a 15-judge court do have.

Now, if the fifth circuit is split and if the four States to the east have just nine judges, the number of incoming cases would be 193 per judge, only slightly less than the 219 per judge in fiscal year 1974 in the fifth circuit with a bench of 15 judges.

Now, with 53 percent of the 2,310 cases pending on June 30, it is likely that your wonderful stack of slip opinions in which you participated would probably not be reduced in size by the fact that the fifth circuit is split?

Judge CLARK. That is true.

Mr. WESTPHAL. But the 51½ inches of slip opinions would be considerably reduced; would they not?

Judge CLARK. Yes. There might also be some slight reduction in the number of en banc opinions that I would participate in, too, Mr. Westphal.

Mr. WESTPHAL. Well, that depends upon what type of internal procedures the new court develops one way or another to deal with that.

Judge CLARK. The problem gets to be one that progresses geometrically when you increase the number of judges on a court. This is significant to me in going from 9 to 11, even. It is not just 2/11th's more difficult.

Mr. WESTPHAL. I understand that.

The other thing the committee has been quite interested in is the fact that the number of cases in which oral argument has been denied in recent years—reaching up to 57 and 60 percent, depending on how you look at the statistics—the resort to other innovations such as Rule 21, and some of these other procedures followed in the circuit are not very satisfying to members of the trial bar throughout the present fifth circuit. Therefore I think there are two objects to be sought as one considers splitting the circuit. One is to try to give the judges of an appellate court a more manageable workload by reducing the per-judge statistics; the second is that by reducing the workload we may obviate the need for a court to resort to various expediencies in order to handle an overwhelming caseload and give that court an opportunity both to accord oral argument in more cases, and to write opinions in more cases, rather than relying upon Rule 21 excessively. I think that that is important, because then the members of the bar, and their clients at large, feel that whatever issues they raise, whatever varying degree of merit they had, were, in fact, deliberately considered by that court. Would you agree that those are two of the objectives that are desired?

Judge CLARK. Absolutely. I wholeheartedly agree.

May I make one comment? I think—and this is a personal opinion which I have discussed with no other judge—I think it would be unrealistic for the Fifth Circuit to be divided on the prospect that the resulting divisions would go back to a regular oral argument calendar. I do think that one important difference would be made and should be made in the approach taken to screening cases without oral argument, and that is that the standard would move from one where the judge asks himself, after reading the briefs, “Would oral argument help me to be surer of my decision in this case?” You see, that gap will let you decide some cases involving very important legal principles where the resolution of the legal principle depends solely on an issue of law. I normally do not get that much out of a lawyer arguing to me that the case of “Jones v. Brown” means thus and thus. Eventually I have to get that case out and read what the Supreme Court meant to say or what another member of my panel meant to say. The lawyer’s urging is of very little help, but when he starts to explain to me how the facts played in it, it gets to be very important to listen to him and consider what he has to say.

But that standard could move from “would oral argument be helpful” to “is this a frivolous case” or “is this a case that is really of very light weight in which the answer is very apparent?” That would still enable us to dispose of a number of cases without oral argument, but a lesser number.

Senator BURDICK. I would like to interrupt at this point.

What is accomplished by granting oral argument when, on the face of the briefs, the case flies in the face of well-established precedent and law?

Judge CLARK. Nothing at all, Senator.

Senator BURDICK. Except maybe making the lawyer feel better.

Judge CLARK. He has gotten a trip, in my opinion. The client is not well served because that expense money has to come from somewhere. The lawyer's time is taken and the court's time is used. We have had lawyers request that cases be placed on the summary calendar because that procedure is now available to them. Previously they would have had to routinely come and appear in New Orleans and so forth. Now we have them ask, with permission of the court, that the case be decided on the briefs.

Mr. WESTPHAL. I think we all recognize that there are certain types of cases in which oral argument is not necessary for a mature and deliberate resolution of an issue, either because there is so little merit that the case is virtually frivolous or, as you stated it, there is only the question of whether a certain case falls within the four corners of a previously decided legal issue. But what you are saying is that, with a smaller court, a more manageable workload, and more manageable procedures in the screening process, there will be room to adopt a different standard, and that, in a case which may not be of earthshaking precedential value, but which nevertheless contains a complication in the facts, oral argument which would be helpful to the court, a decision which would be more satisfying to the lawyers on both sides, and a result which would be more readily accepted by litigants and by the public at large would all be possible under that new standard whereas it is not now possible in such a case.

Judge CLARK. That is very close to my view, Mr. Westphal.

Mr. WESTPHAL. In other words, instead of denying oral argument in 60 percent of the cases, the court would only be denying it in 30 to 40 percent?

Senator BURDICK. It might go to 70, depending on how many frivolous cases you have. How do you get a percentage?

Judge CLARK. I would just give you this example—and I am sure this is not confidential. In my own experience on the court, the number of summary cases in which I am the judge with the initiating responsibility—in other words, where the case comes to me first for review—has varied each year depending upon the panelists I am with. With the case mix that comes to me, I think that it has varied from 45 percent to 70 percent in certain months because we get our statistics by the month. So it is going to move some, you are correct about that. I do hope and I would expect that a higher level of oral arguments would be reached, that a lower threshold would be established for throwing the case over to the oral argument docket, if we had the time to do it.

Mr. WESTPHAL. No further questions.

Senator BURDICK. Thank you, Judge Clark.

Judge CLARK. Could I impose on you for one comment, because it related so specifically to a matter I had brought up in Jackson?

Senator BURDICK. Certainly.

Judge CLARK. You asked Judge Coleman about the establishment of a headquarters in New Orleans for both circuits. I made the suggestion in Jackson as a matter of expediency. I continue to believe that, at least for a temporary time, it would be completely suitable to headquarter both courts, if you do choose to divide the circuits, in the same building in New Orleans where we now have chambers. I know there

are more than 18 sets of chambers in that building for judges and their staffs. I know there is such room and sufficient mechanical ability for a clerical staff to process the number of papers that move in and through our court in total in that building. I suggest to you that it would be a perfectly suitable means of operating both courts if it was on a temporary basis. I did not mean that the facility should serve permanently for that purpose.

Thank you so much. I appreciate having had this opportunity.

Senator BURDICK. Thank you very much. Our next witness is James Hugh Ray of the Mississippi Bar Association.

Welcome to the committee, Mr. Ray.

STATEMENT OF JAMES HUGH RAY, PRESIDENT, MISSISSIPPI STATE BAR ASSOCIATION, TUPELO, MISS.

Mr. RAY. Mr. Chairman and Mr. Westphal, following the basic format of Judges Coleman and Clark, although not in printed form. I should like to make a preliminary formal statement and then attempt to answer any questions you might have.

As president of the Mississippi State Bar, it is my privilege to relate the position of that organization of lawyers on this question of realignment of the Fifth Circuit Court of Appeals. I do so with the approval and at the urging of the Board of Bar Commissioners which is our governing body. I think it will interest this subcommittee to know there are approximately 3,400 lawyers who are members of the Mississippi State Bar and that our bar is what we call an integrated bar, and by that I mean by statute lawyers who are licensed to practice in our State are required to be members of the association.

The Mississippi State Bar strongly favors a division of the Fifth Circuit and an alignment of Mississippi with the States of Alabama, Georgia, and Florida as a separate circuit. The geographic location of our State, its history, as has been so eloquently referred to by Judge Coleman, and its economic ties, the economic ties of its citizens, all reflect a long and continuous bond or a community of interests with our sister States to the east. Historically, as has been pointed out, Mississippi was originally a part of the State of Georgia, as was Alabama. As a consequence of that, our entire body of law, decisional and statutory law, has necessarily been shaped and significantly influenced by that historical fact.

The growth over more than a century of the socioeconomic ties between citizens of the four States mentioned is recognized by the fact that more than 20 departments, agencies, and commissions of the U.S. Government serve at least 3 of these 4 States—at least Georgia, Alabama, and Mississippi—and I am not sure whether these departments and agencies serve Florida. They may.

They serve these States through regional offices that are located in Atlanta, Ga. These agencies and departments include the Departments of Agriculture; Commerce; Defense; Health, Education, and Welfare; Housing and Urban Development; Interior; Labor; the LEAA of the Department of Justice; Department of Transportation. Many other agencies and commissions, of which I have a partial list, have their regional offices in Atlanta and serve Mississippi, Alabama, and Georgia and, as I say, I am not sure, they may serve Florida as well.

[Mr. Ray's complete list appears at the conclusion of his testimony.]

As further evidence of the close interrelationship between these States, Judge Clark alluded to the Tombigbee Waterway in his remarks. This body of water will extend from the Tennessee River through the States of Mississippi and Alabama along the Tombigbee River, the waterway is now under construction and, when completed, it is expected to develop into one of the major arteries of commerce in our section of the United States.

In addition to that project, for some time now, studies have been underway for a proposed highway corridor system which would extend from just north of the State of Florida to Kansas City, Mo., and would serve to further solidly link by this transportation system and communication system the four States to which I have referred.

I might add that representatives from all of these States are working together in a strong spirit of cooperation in an effort to see that this vast corridor system would hopefully become a reality in years to come and serve the Southern part of the United States.

If Mississippi should be severed from its sister States to the East in the realignment of the fifth circuit, it would apparently then be placed with the States of Louisiana and Texas, and the Canal Zone, to the West and perhaps others. In so doing, the value of the judicial history which stems from Mississippi's origin as a part of the State of Georgia would largely be lost insofar as the circuit court of appeals would be concerned.

Louisiana, as you know, has a system of laws based upon the Napoleonic Code, and both Louisiana and Texas, as Judge Coleman has mentioned, are what we know as community property States, as contrasted to the common law system known in Mississippi and the States to the East. Thus, from the standpoint of the value of the judicial history of the decisional law as well as the statutory law, I suggest to you that the judges of a court of appeals would not receive the assistance that they would otherwise receive if Mississippi were placed in a circuit with the States to the West.

The Mississippi State Bar Association strongly urges that our State be aligned with Alabama, Georgia, and Florida in any division that the Congress may make of the existing fifth circuit. We appreciate the opportunity of making this position known to you. We offer to be of any service we can in your considerations and deliberations, and if there should be questions that I can answer as a representative of the Mississippi State Bar, I shall be more than pleased to attempt to do so.

Senator BURDICK. Thank you very much for your testimony this morning.

Whenever we have a problem in this country based upon caseload, we try to meet the problem and give justice at the same time. A few judges appeared here yesterday from your circuit and indicated that splitting the circuit would provide relief for only a short time and then we would need to split again.

How do your lawyers feel about the procedures which have been adopted to enable the judges to turn out more work and relieve themselves of a lot of unnecessary work? Specifically, how do they feel about the screening process?

Mr. RAY. Mr. Chairman, I think it would be fair to state that the practicing lawyers of Mississippi generally feel that they would like an opportunity for more oral argument in their cases on appeal. We recognize, of course, that the court must, in its wisdom, exercise control over its docket and that there are obviously cases which reach the appellate court which do not perhaps merit oral argument, merit taking the time, the valuable time of the judges in order to present oral argument.

However, it is the feeling of the lawyers who practice in Mississippi with whom I have discussed this subject that, under the present workload of the fifth circuit, litigants are being denied the right to have their cases argued orally before that court, in some instances, not because of lack of merit of the points involved, but rather, in some instances, because, as a matter of expediency in handling and controlling its docket, the court has formulated its rules and has imposed them, and we think this is a rather artificial basis of limiting oral argument. I think—to make one further comment—Judge Clark's reference to perhaps lowering the threshold by which a case might be argued orally would be consistent with the position I am stating.

Senator BURDICK. Well, certainly, if you are right, we will find ourselves splitting the split circuit again. Now, you present a very cogent and very sound argument for keeping the four States together based upon the historical premise that they were once a part of the same area and therefore it is just good to have them together. I think that is a very fine argument. But, if you had to split it a second time you would have to do something about that history, would you not? Suppose we do establish a fifth circuit in the four States east of the Mississippi River, and suppose Judge Wisdom and Brown are right, and in about 4 or 5 years we have to split it again. Where do you split it then? Do you see now why we are thinking of procedures, too?

Mr. RAY. I understand. Obviously, the court has to have procedures which enable it to handle and manage its docket and its caseload. It seems to me that, with the benefit of the history we now have of the 15-judge court of appeals, it is fairly well evidenced, I think convincingly so, that adding judges is not the answer.

Senator BURDICK. That is right.

Mr. RAY. I personally favor, and I can say I speak for the Mississippi State bar in making this statement, a court no larger than nine judges, an appellate court no larger than nine judges. As we know, that is the composition of the U.S. Supreme Court. That happens to be also the composition of the Mississippi Supreme Court, which has problems, as do appellate courts all over the country.

I think that there are many ways by which a court may undertake to manage, and maybe more efficiently manage, its crowded docket problems and growing backlog of cases. Obviously in the Federal appellate system, as has been mentioned by you in your questioning this morning, some consideration must be given to the question of whether the jurisdiction of the appellate courts is going to be limited or restricted in any way or enlarged by future legislation, and I would not attempt to project into the future and hazard a guess at what the situation might be a few years from now. I do not think anybody can rightfully say.

Senator BURDICK. As the fellow says, I am glad you raised that question. What would the Mississippi Bar do with regard to the present legislation that has been——

Mr. RAY. What would it do?

Senator BURDICK. Yes; how would it resolve it?

Mr. RAY. I think I can say without polling the bar that—I think I know the bar well enough to say that—we would like to see diversity left.

Senator BURDICK. This is an example of what happens. All the studies advise that we give less jurisdiction to the Federal courts, but when we get down to the practical issue of doing something about it, we do not do it.

Where would you reduce jurisdiction?

Mr. RAY. Where would you reduce it?

Senator BURDICK. Yes.

Mr. RAY. I think I may not be qualified to offer testimony on that point. I think obviously that diversity is one area where it could be reduced. If I understood Judge Clark, about 10 percent of the caseload in the fifth circuit results from diversity cases now. That would reduce it some.

Senator BURDICK. Do you know what would happen if we reported that diversity legislation out of the committee to the Senate floor? We would have a flurry of opposition from lawyers from Mississippi and everywhere else. Until the bars themselves take a responsible position here and do something about reducing jurisdiction, relief will not be achieved. This may not be the way, but I think we have a problem with the practicing bar.

Mr. RAY. That is right.

Senator BURDICK. Well, staff has a question.

Mr. WESTPHAL. I was just going to suggest, Mr. Ray, do you know Larry Franck from Jackson?

Mr. RAY. Yes, sir.

Mr. WESTPHAL. Larry Franck, when addressing himself to the Commission, in response to a question the chairman just asked you, gave this testimony, and I quote:

Accordingly, I believe the time has come for serious consideration to be given to sharp restrictions upon the district court's original—or removal—diversity jurisdiction. Specifically, it seems to me that a substantial case can be made for limiting that jurisdiction to instances in which an actual showing of probably local prejudice can be demonstrated.

Now, the bill which Senator Burdick has sponsored and which contains a recommendation emanating from the American Law Institute is a bill which would not abolish diversity jurisdiction completely. What it would do is say that a Mississippi litigant, or a litigant in any other State, should not be allowed to bring an action in Federal court just because by accident the defendant he is suing happens to have citizenship in another State, because to allow jurisdiction under those circumstances is to have the Mississippi litigant say, "I, as a Mississippian, cannot get a fair trial in the State courts in my own State." Now, if a Mississippian happens to be sued by a resident of Louisiana in a Louisiana court, then it is entirely proper for the Mississippi man to allege that he cannot get a fair trial in a Louisiana State court and, therefore, the law should allow him to remove that action to the Fed-

eral district court in Mississippi. Now, this is a very modest curtailment of diversity jurisdiction of Federal courts. It would have an impact numerically which would probably not be too great. But it seems that it would be a little bit more logical a rule than the rule which prevails at the present time which permits a citizen of a State to say that he cannot get a fair trial in the courts of his own State.

Now, if that is the case, then that litigant and the lawyer who represents him should get to work within their own legislature and within their own bar association to see to it that changes are made in the State court system which will allow him to get a fair trial and a prompt trial under the best procedures that that State has.

Now, when viewed in that light, do you adhere to your position, or do you think that the majority of the members of the Mississippi State Bar would oppose any curtailment in diversity jurisdiction, or do you think that the majority of them might agree with Larry Franck that some modest inroads along this line have to be considered by Congress?

Mr. RAY. Mr. Westphal, I will be glad to respond to that, and you understand that I am giving you my personal views, just——

Mr. WESTPHAL. I understand that, sir.

Mr. RAY [continuing]. As I was giving the chairman a moment ago.

I think that the majority of the practicing lawyers in Mississippi would not like to see curtailment made on the diversity jurisdiction question. I think, obviously, that there is some developing sentiment that would agree with Larry Franck in his statement.

From my personal experience in practicing law, largely in the northeastern sector of Mississippi, I can tell you that in the cases we have been involved with where our client has had the privilege of removal or remaining in the State court where the action was initiated, I do not recall us making that decision on the basis of whether we thought our client would be getting a fair trial in the State court, but rather largely because of the advantage we thought the discovery rules in the Federal system offered compared to our State discovery rules.

Mr. WESTPHAL. What happens if the Mississippi State Bar Association tries to get the Federal Rules of Civil Procedure adopted within the Mississippi State practice?

Mr. RAY. Well, over a long period of years some effort has been made to accomplish that. We are still working on it.

I might, as a personal note, say that in the mid-1950's I happened to be chairman of a code study committee in our "young lawyer's section" and recommended that we enact substantially the Federal Rules of Civil Procedure in our State courts.

We have presently, and have had in the last year at least, very serious efforts being made to make substantial improvements in the administration of justice in our State courts. I refer particularly to a bill which passed one house of our legislature earlier this year, and which wound up in conference between the two houses, that would have recognized the authority of our Supreme Court to make its own rules of practice and procedure that would apply to our judicial system.

Many of us who participated in that effort were heartened considerably. We think the time is nearing when we may see successful results made.

Now, in the context of that, we also are working on the adoption of rules which hopefully would be substantially patterned after the Federal rules and thereby take advantage of an already well-developed body of law.

So I think we are making progress and the Mississippi judiciary, in my view, is sound and healthy, but like that of many other States and of the federal system, it is overworked at the present time.

Mr. WESTPHAL. I might make two observations. First, if you do succeed in having Mississippi adopt the essence of the Federal Rules of Civil Procedure, then your decision on removal, when you have to make that decision, will not be prompted solely by whether or not you can get into Federal court or can use Federal Rules of Civil Procedure?

Mr. RAY. Yes.

Mr. WESTPHAL. The other observation I would like to make is this, that several years ago the subcommittee sent every bar association in the Nation copies of the bill encompassing this ALI proposal along with some additional material that tries to explain it and invited each bar association to give some consideration to it. A number of bar associations appointed committees for that express purpose and we have heard from them. That has taken some time, because these things do not move fast. But now, gradually, a number of State bar associations have supported this modest inroad in diversity jurisdiction—

Senator BURDICK. Just a minute. Let me correct my own staff member. That has not come from the State conventions; that has only come from the committees.

Mr. WESTPHAL. Correct, that has not come from the ABA.

Senator BURDICK. No, from the State bars.

Mr. WESTPHAL. In any event, Mr. Chairman, would you agree if I were to invite Mr. Ray to see what he can do to have his own bar association look into this?

Senator BURDICK. I do not like to disagree with my own staff, but if the executive committee could agree—you have not yet had a full State bar session?

Mr. RAY. Yes.

I can say this. I was not aware of the point you just made that, at some earlier time this information had been submitted to the State bars. I have served on the Board of Bar Commissioners and then as president-elect and this year as president. I presume this must have occurred at an earlier time, but I would be more than happy to present this matter to our board of commissioners for their consideration, and beyond that, I, of course, do not know what the result of their deliberations would be, but I would be very pleased to do that.

Mr. WESTPHAL. Thank you, Mr. Chairman, I have no further questions.

Senator BURDICK. Thank you very much.

This completes the second day of our hearings on the fifth circuit.

We will hear several other witnesses tomorrow. The committee will be in recess until 10 o'clock tomorrow.

Mr. WESTPHAL. Mr. Ray, could I get from you the list of those agencies which you mentioned earlier in your testimony?

Mr. RAY. Yes.

[The requested material follows:]

ATLANTA REGIONAL OFFICES

Department of Agriculture

Consumer and Marketing Service.—Meat and Poultry Inspection Office, Southeastern Region; Information Division, Southeast Region; Plentiful Foods Program, Southeastern Regional Office; Poultry Division (Market News Branch), Poultry and Poultry Products Office.

Food and Nutrition Service.—Southeast Area Office.

Forest Service.—Regional Office, Region 8; State and Private Forestry Areas, Southeastern Area Office.

Department of Commerce

Bureau of the Census.—Regional Office.

Department of Defense

Office of Civil Defense.—Regional Office (Thomasville, Ga.), Region 3.

Department of Health, Education, and Welfare

Regional Offices.—Regional Office, Region 4.

Food and Drug Administration.—District Office.

Department of Housing and Urban Development

Region 4.—Regional Office.

Department of the Interior

Bureau of Outdoor Recreation.—Southeast Regional Office.

Bureau of Sport Fisheries and Wildlife.—Regional Office, Region 4.

Department of Justice

Law Enforcement Assistance Administration.—Regional Office, Region 3.

Naturalization Information Field Office.

Department of Labor

Bureau of Labor Statistics.—Regional Office, Region 4.

Manpower Administration.—Regional Office, Region 4.

Workplace Standards Administration.—Regional Office.

Bureau of Labor Standards.—Regional Office.

Women's Bureau.—Regional Office.

Office of Federal Contract Compliance.—Regional Office.

Department of Transportation

Federal Highway Administration.—Regional Office, Region 3.

National Highway Traffic Safety Administration.—Regional Office, Region 4.

Urban Mass Transit Administration.—Regional Office.

Civil Service Commission

Regional Office.—Atlanta Region.

Commission on Civil Rights

Field Office.—Southern Region.

Environmental Protection Agency

Interim Regional Coordinators.—Region 4.

Equal Employment Opportunity Commission

Field Office.—Atlanta.

Federal Communications Commission

District Office.—District 6.

Federal Mediation and Conciliation Service

Regional Office.—Region 3.

Federal Power Commission

Regional Office.—Atlanta.

Federal Trade Commission

Field Office.—Atlanta.

*General Services Administration**Regional Office.*—Region 4.*National Archives and Records Centers.*—Federal Records Center, Atlanta.*Business Service Centers.*—Service Areas, Region 4.*Federal Information Centers.*—Atlanta.*Interstate Commerce Commission**Regional Office.*—Atlanta (Region 3).*Office of Economic Opportunity**Regional Office.*—Region 4.*Office of Emergency Preparedness**Regional Office.*—Region 3.*Railroad Retirement Board**Regional Office.*—Atlanta.*Securities and Exchange Commission**Regional Office.*—Atlanta.

[EDITOR'S NOTE.—The following information is presented as a supplement to Mr. Ray's list in accordance with Judge Charles Clark's request:]

U.S. COURT OF APPEALS,
FIFTH CIRCUIT,
Jackson, Miss., November 4, 1974.

WILLIAM P. WESTPHAL, Esq.,

Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: At the time of my testimony I was not aware that the Federal Prison System (which is involved with more than 33½% of the cases before our court) places Texas and Louisiana in its South Central Region with headquarters in Dallas and places Mississippi, Alabama, Georgia and Florida in its Southeast Region with headquarters in Atlanta. If it was contained in the listing of information submitted by Honorable James Hugh Ray, it escaped my attention. If the record is still open and this very significant fact is not a part of it, I request that it be placed before the subcommittee.

Please give my regards to Senators Burdick and Hruska and thank them again for their cordiality and attentiveness at the hearing.

Respectfully,

CHARLES CLARK, *Circuit Judge.*

[Whereupon, at 12:20 p.m., the subcommittee was recessed, to reconvene at 10 a.m., Thursday, September 26, 1974.]

CIRCUIT REALIGNMENT

THURSDAY, SEPTEMBER 26, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 o'clock a.m., in room 2228, Dirksen Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick and Hruska.

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. This is the third day of hearings on the question of realigning the fifth and ninth circuits. Our first witness this morning will be John H. Hall, attorney at law, Dallas.

Welcome to the committee, Mr. Hall.

STATEMENT OF JOHN H. HALL, ATTORNEY AT LAW, DALLAS, TEX.

Mr. HALL. Thank you, sir.

I might say, by way of preface, that my brief remarks are not those of an appellate lawyer because I seldom appear in an appellate court. My views are those of one whose appearances are in the trial courts.

In August of 1973, in Houston, when the Commission on Revision of the Federal Court Appellate System held hearings, the Commission was told in substance that it was a misconception that the fifth circuit was in trouble. It was told that it was absolutely current, thus apparently indicating that the fifth circuit's yardstick for being in or out of trouble would be whether the caseload is being handled, not how it is handled.

It seems to me that being current and being in trouble is mixing apples and oranges. If expediencies are keeping the circuit current, it results in dispensing with justice, not in the dispensing of justice; it results in doing away with the Anglo-American adversary case and controversy system.

I use that phrase because that is the phrase used by the fifth circuit in *Huff v. Southern Pacific Railroad*, in the course of its opinion describing the manner in which the circuit is handling its expanded caseload.

But this case and controversy system is being sacrificed by expediency in order to keep current. Figures were presented to the committee in Houston in August 1973 showing that the fifth circuit caseload increase was some 90 percent from 1968 to 1973. Figures

were also presented there showing that the opinions of the judges during the same period of time increased 124 percent. This increase has been handled through what the Court described in its opinion in *Murphy v. Holman* as "judicial inventiveness" to increase productivity and expedite disposition.

I do not see how we can properly keep current through expediency any more than a surgeon can perform a 2-hour operation in 30 minutes.

When there is an increase in the caseload of some 90 percent, something has to give way if the court is to continue current. The hours in the day do not increase, the days in the week do not increase, and the judges do not increase. Many of the lawyers are concerned about what is the result of this.

I think most believe that the adversary case and controversy system has suffered because of the manner in which the caseload is handled. When you screen cases to either curtail or eliminate oral argument, or put cases on the summary calendar, that tends to do away with the adversary case and controversy system.

Oral appellate argument has never been said to be unnecessary. Has any lawyer or judge ever read a brief without there being some question raised which could be answered in oral argument? Doing away with oral arguments speeds us toward an administrative system as distinguished from a judicial system.

None of the fifth circuit opinions explaining the expediciencies used to handle the caseload give any indication of the manner in which the law clerks are used. There is wonderment as to whether perhaps the clerks are being used for work that is better done by judges. How is the influx being handled when there is no increase in judges or hours in the day?

I do not know how it is handled and cannot tell you, but I think there is apprehension among the lawyers that the law clerks may have much to do with the judicial process as distinguished from the administrative process. That may be unwarranted. I hope it is, and I hope that, either this subcommittee will determine, or the Commission on Revision of the Federal Court Appellate System has determined, that the internal procedures are such that the law clerks are doing only the work of law clerks.

If law clerks are involved in duties better handled by a judge, it is submitted that a law clerk cannot do what a judge should do any more than a competent nurse in an operating room can perform surgery for a surgeon.

We seem to be caught in a wave of expediciencies to keep current. There was an article in the August 1974 American Bar Association Journal, speaking on why we should retain the jury system in trials, which stated:

"Just as justice delayed is justice denied, assembly line justice is no justice at all."

I think the fifth circuit is to be commended for initiating various procedures to keep current, but I feel that this should continue, and should have and does have its origination, only as a stop-gap situation.

I have never heard anyone say that the expediciencies presently used are better than what was used before the influx of the caseload.

Chief Justice Warren Burger alluded to the effect of a heavy caseload upon the U.S. Supreme Court in an article written by him which appeared in the American Bar Association Journal in July 1973. He recognized that the caseload ultimately affects the quality of the product of the U.S. Supreme Court. This would be just as true as it relates to the courts of appeal.

In reality, the court of appeals is the Supreme Court to most litigants, for seldom do their cases ever go to the Supreme Court.

Any expediency used which decreases the right of oral argument or affects quality of the product or results in assembly line justice is a tragedy. It is a tragedy not only to the litigant in particular, but it is a tragedy to the people in general. Their basic rights are just gradually eroding away and they are not even aware of what is happening to them.

I think the problem is a very difficult one, but if we are to keep the adversary case and controversy system, something must be done. The caseload continues to increase; it is not decreasing. Just as the population increases, and just as the population increase results in building more hospitals and schools, it is submitted that the caseload increase should result in more judges.

We need increased judicial manpower for the increased caseload. Even now the fifth circuit uses more judges than it has. Some of the district court judges and some of the judges from the other circuits come in and sit from time to time on the panels hearing the cases in the fifth circuit.

In solving the problem, it seems to me that not only could the circuit be split geographically, but that the number of judges should be increased to be commensurate with the need.

The fact that, historically, there have been 15 judges for the fifth circuit consisting of the six States in it and the Panama Canal does not seem to me to be a reason to continue that number when more are needed.

Thank you.

Senator BURDICK. I just have one or two questions, Mr. Hall.

Testimony received in the last 2 days indicates that, under the screening process practiced in the fifth circuit, after a case has been assigned to the panel, panel members read the briefs and then determine whether or not an oral argument is necessary, and if any one of the three thinks an oral argument is to be had, it is granted. Is that not a pretty good safeguard?

Mr. HALL. I feel that, when they are confronted with the caseload that they have, it tends to at that point cause expediences to take over, because, if there is a benefit of the doubt, I imagine they give the benefit of the doubt to not having the argument.

Senator BURDICK. The evidence does not show that: they just say, "If one man alone for any reason asks for an oral argument, it is granted."

Mr. HALL. Yes.

Senator BURDICK. You will have to concede there are cases that have less than real merit when they come up.

Mr. HALL. I will agree with that.

Senator BURDICK. We heard a statement from Judge Wisdom which said that the British judges handle several—how many did he say?

Mr. WESTPHAL. Their Court of Criminal Appeals handles about 10,000 cases a year as compared to the 3,000 that the fifth circuit has.

Senator BURDICK. I guess there are other facts to be weighed, but our American system of law springs from the common law system which we took from England. Do you think they are moving away from that old common law system and not giving justice to litigants?

Mr. HALL. I think, in the manner it is handled, they are doing that. I do not profess to be an expert on the British system, although I have heard some of their barristers and even the Lord Chief Justice speak. They do have a system whereby their judges, as I understand it, come from the pick of the trial bar, and, as I understand it, they seem to be very knowledgeable and up to date in the law. I think their system of selecting judges is entirely different from ours, and I think that has an effect on this, when trying to compare the two.

Senator BURDICK. Well, before I get along too far in years in this committee, I am going to take one more trip, and I am going to look at that British system and see what they are doing that we do not do and see just what is happening over there. I was intrigued by Judge Wisdom's statement. I could not believe it for a while, but he seemed to be rather convincing.

Well, we get your point. We do not want a denial of justice, and you are afraid if we do not get more judge power we will not have justice and that the center of justice will deteriorate. Is that your point?

Mr. HALL. Yes, sir.

Mr. WESTPHAL. I have just a few questions, Mr. Hall.

In your remarks you mentioned that you had some question in your mind, as a lawyer, as to the extent to which the law clerks employed by the judges may, under this pressure of a large volume of cases, be doing work in the appellate process that is probably beyond the capacity of a law clerk to do; you are apprehensive that, because of this heavy volume of work, the judges are probably forced to rely on some extra help from law clerks beyond their competency, which they would not do if they did not have such a heavy caseload to cope with. Do you recall that?

Mr. HALL. Yes, sir.

Mr. WESTPHAL. Of course, I think this has been the suspicion of trial lawyers for several years. That is, we have always suspected that the law clerk wrote the opinion and had a great deal of input into the decision; everybody has always been a little bit suspicious of that.

I think that in actuality what happens is that if you have a good conscientious judge—as I would estimate 99 of every 100 of our judges are, by and large—then they will not suffer any law clerk to make a decision for them. They do get help from the law clerk in the initial drafting of an opinion or the initial research on a legal issue. I think that that fact may vary; as the caseload of a court gets too heavy for the judge to bear you get more and more reliance on a law clerk.

There have been proposals made that the Congress should authorize, in addition to the two or three law clerks that work for each appellate judge, a corps of five or six staff attorneys for each circuit court of appeals. They would be headed by a man who has had considerable trial experience, to whom we would pay a commensurate salary, and these staff attorneys would work for the court as a whole in the appel-

late process. They would assist in the screening in this way. After the judges have made the initial determination that a case, for example, would not be accorded oral argument but would be decided on the briefs, then the staff attorneys would try to analyze the issues, the evidence and the law in the case and lay it before the judges. The judges would then make a tentative decision, and they would then get some help from either their individual law clerks or these staff attorneys in the drafting of an opinion.

Now, what reaction do you have as a trial attorney in the State of Texas to that concept of "staff attorneys?"

Mr. HALL. Well, I gather that you are creating sort of an administrative mini-judge, and to me, rather than doing that, I would rather see more judges.

I think, certainly, that if there is anything to this apprehension that the lawyers have concerning law clerks, that that system would be better than the present one, but I do not think it would be as good as having more judges.

Mr. WESTPHAL. Of course, in the best of all worlds, we would like to have our judges have a caseload that they could handle personally, that they could handle without need of law clerks, and we would be sure that we would have each judge making his own mature, deliberate decision on the facts in the case. That is the best of all worlds. But I am sure you realize that, as this volume of legal business grows; we are never going to be able to go back to that so-called best of all worlds, that we do have to make some changes in our method of handling an ever-increasing volume of cases. Is that not true?

Mr. HALL. I do not look at it that way if you proceed from the premise that our system is the best system. That is why I alluded to the idea of using a nurse in an operating room to try to cut down on time. I do not see how you can change the system, if you believe in the basic system.

We have increased other things because of population increases, and I do not see why we should not increase judge power because of the same thing.

Mr. WESTPHAL. Let me draw an analogy to what examples you have given here.

I am sure that in the field of surgery there used to be the day that the surgeon did everything in connection with the surgery, including stitching up the incision. He did everything. Now the practice is that a good competent surgical nurse in there will sometimes herself stitch up the wound, as long as she does it under the supervision of the surgeon, who is still there and is concerned about other things such as watching the vital signs of the patient. Now, the surgeon needs her help in order to perform his skill well.

I do not know what the size of your law firm is, but when I was practicing law and was the main trial attorney in the firm, I had the help of younger lawyers in my office. They either rendered assistance on a case while I was in trial on that case, or they were preparing other cases for me. Would you not concede that, drawing that analogy, judges do have to have the help of law clerks and do have to have the help of staff attorneys, and that the main thing that keeps the system working properly is that the judge who has this assistance of staff is not so over-worked that he cannot still give his own close personal supervision and

have his own imprint on the end product? Do you think those are the proper guidelines?

Mr. HALL. I think they are. I think that, if there is a hole in that, so to speak, it is to make sure that it does not proceed to the point where in fact the law clerk or staff attorneys are in reality doing what the judge should be doing. To me the issue is how that line is determined and who makes sure it is not crossed.

Mr. WESTPHAL. That is absolutely correct. You put your finger on it. If I come in to your firm and retain you as a lawyer at whatever hourly rate we agree on to handle a case, the only way I know that you are going to do the work on my case rather than have some young lawyer in your firm who is just one year out of law school doing that work, is to have confidence in you and in your integrity and ability as a lawyer. Then I, as your client, would be satisfied. It is the same way with us as lawyers as we view our appellate judges. We have to have confidence in their integrity, in their conscientiousness about their work. We have to trust that they will not suffer any law clerk to be making any active decisions for them. Isn't that about what it boils down to?

Mr. HALL. Yes.

Mr. WESTPHAL. Do you have any feelings about one of the proposals ultimately recommended by the Commission which would divide the six States of the fifth circuit by putting the four eastern States in one circuit and Texas and Louisiana into a second circuit? Do you have any feelings about a circuit composed of only the States of Texas and Louisiana?

Mr. HALL. No. I think that if they are going to be split, No. 1, it is better to use States within the circuit rather than bring in other States; plus the fact that to have adjoining States together would make the most sense.

As I recall the figures, if Texas, Louisiana, and Mississippi were together with the Panama Canal Zone and if the other three to the East were together, then I believe the caseload is substantially the same for each.

Mr. WESTPHAL. Well, I think that was true for the 1973 statistics. I think as the filing picture has changed a little bit in 1974, and we get very close to equality in caseload under a 4 to 2 split. I will supply you with the figures here in a moment.

Mr. HALL. That would seem to be the situation under the latest figures. I would see no objection to that. I do not know what or how to project what it might be in the future. If we split it that way, and then find that the whole situation changes so that perhaps it doubles in the east or perhaps it doubles in the west, I do not know what we would do to settle that problem.

Senator BURDICK. The record shows that you people in Texas are big litigators. The biggest increase is generated right there in Texas.

Mr. WESTPHAL. In any event, as a lawyer you have no strong feeling that a circuit should consist of more than two States?

Mr. HALL. No.

Mr. WESTPHAL. I believe that is all the questions I have, Mr. Chairman.

Just one thing. Do you have an extra copy of your prepared remarks with you, or if not, may we borrow your copy and Xerox it?

Mr. HALL. Certainly.

Senator BURDICK. Any questions, Senator?

Senator HRUSKA. I have no questions.

Thank you for appearing here, Mr. Hall.

[EDITOR'S NOTE.—In preparation for these hearings, the subcommittee sought the views of the State Bar of Texas. The subcommittee unfortunately did not receive a response from the State Bar of Texas until after completion of the hearings. There follows a complete record of all the pertinent correspondence between the subcommittee and the State Bar of Texas.]

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C., September 9, 1974.

Mr. LEROY JEFFERS,
Attorney-at-Law, Vinson, Elkins, Searls, Connally and Smith, First City National Bank Building, Houston, Tex.

DEAR MR. JEFFERS: In preparation for this subcommittee's consideration of recommendations by the Commission on Revision of the Federal Court Appellate System with reference to the division of the Fifth Circuit, I have just finished reading your interesting testimony given approximately one year ago when the commission met in Houston.

In addition to sponsoring the legislation which created that commission, this subcommittee under the chairmanship of Senator Burdick has also been handling S. 1876 which contains the proposals to make a limited restriction upon the diversity jurisdiction of the district courts in addition to other revisions and improvements in federal jurisdiction. In your testimony you mentioned that the Texas State Bar Association, at its July 1973 meeting, created a special committee to study the matter of federal court jurisdiction, including S. 1876. I would appreciate it if you could now advise whether the special committee of the bar association has completed its study and particularly whether it has taken a position with reference to S. 1876.

I would also like to inquire whether the bar association has now taken any official position with reference to proposals to divide the Fifth Circuit as a means of coping with the ever increasing appellate caseload in that circuit. Whether or not an official position has been taken, am I correct in assuming that either you or your successor as the president of the bar association would be interested in presenting either a written statement or oral testimony when this subcommittee considers the various proposals made by the commission with reference to the Fifth Circuit? I would appreciate hearing from you on this latter point at your earliest convenience.

Sincerely,

WILLIAM P. WESTPHAL, *Chief Counsel.*

STATE BAR OF TEXAS,
Houston, Tex., October 29, 1974.

Mr. WILLIAM P. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: Your September 9 letter inquires as to whether the State Bar of Texas has taken any official position with reference to proposals to divide the Fifth Circuit, on S. 1876 or other proposals to limit diversity jurisdiction of the district courts, or with reference to other revisions and improvements in federal jurisdiction. During my Presidency of the State Bar of Texas, the Board of Directors on its behalf did take official action with reference to these proposals. The action taken was reported by me to the Commission on Revision of the Federal Court Appellate System for incorporation in its record and in the official report to be made by it. I am enclosing copies of my letters making these reports.

The State Bar of Texas, of course, continues to be very much interested in all proposals and legislative developments concerning the Fifth Circuit and concerning revisions in federal appellate court jurisdiction and procedures. I am confident that the State Bar of Texas would want to be represented by oral testimony and written statement at any Subcommittee hearing conducted on the subject. I am sending a copy of your letter and of this letter to Honorable Lloyd

Lochridge, the current President of the State Bar of Texas, for his information and for his confirmation of my view that the State Bar of Texas would like the opportunity of presenting its official position to the Subcommittee at any hearings conducted by it on these subjects.

Sincerely yours,

LEROY JEFFERS.

[EDITOR'S NOTE.—The enclosures in Mr. Jeffers' October 29th letter follow:]

STATE BAR OF TEXAS,
Houston, Tex., December 3, 1973.

Hon. A. LEO LEVIN,
Executive Director, Commission on Revision of the Federal Court Appellate System, Court of Claims Building, Washington, D.C.

DEAR PROFESSOR LEVIN: I am enclosing 20 copies of the Statement of Position of the State Bar of Texas concerning the three alternative realignments to which the consideration of the Commission has been narrowed according to its preliminary report. You will note that this Statement of Position of the State Bar of Texas favors the first alternative described in the preliminary report and recommends its adoption.

Sufficient copies are enclosed for distribution to all members of the Commission.

Sincerely yours,

LEROY JEFFERS, *President.*

STATE BAR OF TEXAS,
Houston, Tex., December 3, 1973.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM,
*Court of Claims Building,
Washington, D.C.*

TO THE HONORABLE MEMBERS OF THE COMMISSION: The State Bar of Texas has now given careful consideration to the preliminary report of the Commission enumerating three alternative proposals for the realignment of the United States Court of Appeals for the Fifth Circuit which are stated "to remain under active consideration." Appropriate Committees of the State Bar of Texas have deliberated upon the preliminary report and the three alternative realignments pursuant to the Commission's invitation to the Bar for "reasoned comments and advice." The result is that the Board of Directors has voted overwhelmingly to recommend to the Commission that it adopt the first alternative described in its preliminary report under which there would be a realignment of the Fifth Circuit into two Circuits composed of Florida, Georgia and Alabama in one and composed of Texas, Louisiana, Mississippi and the Canal Zone in the other. The policy reasons behind the recommendation that the first alternative be adopted as the most desirable of the three still under active consideration are as follows:

(1) This alternative would make the two emerging Circuits more equal in caseload than either of the other two alternatives based on 1973 filings as described in the preliminary report. This most even case division of the three alternatives is stated to be 1,500 cases in the Florida, Georgia and Alabama Circuit and 1,464 cases in the Texas, Louisiana, Mississippi and Canal Zone Circuit. Based on the most reasonable projections, the caseload between the two emerging Circuits under the first alternative is likely to continue to be more evenly divided than would be the case under either of the other two stated alternatives.

(2) The first alternative results in the two emerging Circuits which would be most cohesive geographically. Contiguous states would be present in both Circuits. Transportation facilities between points in Texas, Louisiana and Mississippi and New Orleans are quite good. Transportation facilities are further very good between points in the cohesive states of Florida, Georgia and Alabama, particularly with Atlanta, Miami, Jacksonville and Birmingham.

(3) The first alternative does not disturb any other existing Circuit and maintains continuity by preserving present alignments among the two groups of contiguous states into which the Fifth Circuit would be divided.

(4) Alternative 1 would maintain a higher degree of desirable variations in economy and viewpoints than would either the second or third alternatives and in the judgment of the State Bar of Texas would result in the best balanced realignments of any of the three proposed.

Respectfully submitted.

LEROY JEFFERS, *President.*

STATE BAR OF TEXAS,
Houston, Tex., June 27, 1974.

HON. A. LEO LEVIN,

Executive Director, Commission on Revision of the Federal Court Appellate System, Court of Claims Building, Washington, D.C.

DEAR PROFESSOR LEVIN: The Board of Directors of the State Bar of Texas, which is composed of thirty members elected by printed mail ballot by the lawyers in the various geographic Bar Districts, has unanimously adopted three recommendations to the Commission on Revision of the Federal Court Appellate System relating to issues which you now have under consideration. The State Bar of Texas is a statutory agency of which all of the approximately 24,000 licensed lawyers in Texas are members. It is declared by the statute to be a part of the Judicial Branch of the government of the State of Texas.

We will greatly appreciate your informing the members of the Commission and entering into the records of the Commission the following recommendations:

(1) It is recommended that the right to oral argument of all cases in the United States Courts of Appeals be preserved and strengthened. In the numerous instances where it has been eliminated or severely curtailed, it is recommended that it be restored. It is deemed that oral advocacy is a traditional, vital and important part of the adversary process and that its erosion constitutes a weakening of the adversary system of justice and the acceleration of a trend toward the administrative rather than the adjudicative disposition of appeals.

(2) It is recommended that the statutory provision for the convening of three-judge federal courts be repealed. Such action would conserve judicial time both at the trial and appellate court levels without adverse effects on the adversary process or the proper adjudication of constitutional issues.

(3) It is recommended that the jurisdiction of United States District Courts and United States Courts of Appeals to review final judgments of state courts in criminal cases be either abolished or severely curtailed by statute. The recommendation is that, in any event, the grounds upon which judicial review is sought in the federal courts must have been first raised and fully developed in the state court in which the judgment in the criminal case was entered and the remedy in the state court thereafter completely exhausted by appeal to the highest appellate court in the state having jurisdiction of the case and thereafter by appeal or petition for *writ of certiorari* to the United States Supreme Court. This recommendation is addressed to the problem of numbers of cases in the federal courts which can never be dealt with by changes in structures or procedures except by way of stop-gap measures until this source of federal cases is eliminated or severely curtailed.

Respectfully yours,

LEROY JEFFERS, *President.*

STATE BAR OF TEXAS,
Austin, Tex., November 4, 1974.

Re Position of the State Bar of Texas with reference to Proposals to Divide the Fifth Circuit, on S. 1876 or Other Proposals to Limit Diversity Jurisdiction of the District Courts or with reference to Other Revisions and Improvements in Federal Jurisdictions

MR. WILLIAM T. WESTPHAL,

Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: I have received a copy of a letter dated October 29, 1974 addressed to you by my distinguished predecessor, Leroy Jeffers, respecting the above mentioned subject.

He has, of course, accurately stated the official action taken by the State Bar of Texas through its Board of Directors during his Presidency and reflected by the letters which he wrote under date of December 3, 1973 and June 27, 1974 to the Honorable A. Leo Levin, Executive Director of the Commission on Revision of the Federal Court Appellate System there.

The State Bar of Texas would indeed like an opportunity to present its official position to the Subcommittee at any hearings conducted by it on the subject and to supply a written statement at such hearings.

I would be most appreciative if you could have me notified when there may be held any such hearings and when our position may be presented.

Sincerely yours,

LLOYD LOCHRIDGE.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C., November 7, 1974.

Mr. LLOYD LOCHRIDGE,
President, State Bar of Texas,
Austin, Tex.

DEAR MR. LOCHRIDGE: This will acknowledge receipt of your letter of November 4th, referring to the exchange of correspondence between Mr. Jeffers and me relative to the position of the State Bar of Texas on proposals to divide the Fifth Circuit.

After my letter of September 9th to Mr. Jeffers, I had a telephone conversation with him on September 16, 1974, in which I advised that the subcommittee had scheduled hearings on this legislation on September 24th, 25th and 26th and indicated our desire to have a representative of the State Bar of Texas appear at the hearings. It is my recollection that Mr. Jeffers informed me of the fact that you had succeeded him and I understood that he would refer my request on to you. Thereafter, I was not advised that your association would be able to send a representative to the hearings on any of these dates and therefore I arranged to incorporate in the hearing record the Statement of Position contained in Mr. Jeffer's letter of December 3, 1973, to the Commission on Revision of the Federal Court Appellate System.

Thus, at the present time, there are no further hearings contemplated by the subcommittee. However, it is always possible that Senator Burdick, as chairman of the subcommittee, may schedule some additional hearings and if so we would at that time be happy to receive the testimony which you might deem necessary as a supplement to the position statement of December 3, 1973. I am sending a copy of this letter to Mr. Jeffers by way of acknowledging his letter of October 29, 1974.

Sincerely,

WILLIAM P. WESTPHAL, *Chief Counsel.*

STATE BAR OF TEXAS,
Austin, Tex., November 15, 1974.

Re: Position of the State Bar of Texas with reference to proposals to divide the Fifth Circuit, on S-1876 or other proposals to limit diversity jurisdiction of the District Court or with reference to other revisions and improvements in Federal jurisdiction

Mr. WILLIAM T. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: Thank you for your letter of November 7th pointing out that the Subcommittee has already had its hearings on this particular legislation on September 24-26 and that you will let me know should any further hearings be scheduled by the Chairman, Senator Burdick.

Good wishes,

Sincerely,

LLOYD LOCHRIDGE.

Senator BURDICK. Mr. Joe J. Harrell, attorney at law, Pensacola, Fla., is our next witness. I assume you are here to let the record also show that we have some litigators down there in Florida, too.

**STATEMENT OF JOE J. HARRELL, ATTORNEY AT LAW,
PENSACOLA, FLA.**

Mr. HARRELL. Good morning.

Senator BURDICK. Welcome to the committee, Mr. Harrell.

Mr. HARRELL. I am Joe J. Harrell from Pensacola, Fla. I have been a member of the Florida Bar since 1948, and have practiced in Pensacola continually since that time. I have been a member of the Board

of Governors of the Florida Bar, a member of the Florida delegation to the Fifth Circuit Conference since 1970, and a member of the committee that was appointed by the president of the Florida Bar to study the problem of restructuring the fifth circuit, which, I believe, was activated in September 1973.

A report was made to the Florida Bar by the chairman of that committee, Thomas C. McDonald, Jr., and with your indulgence I would like to read the minutes reflecting that report. It is very short.

This is an excerpt from the minutes of the regular meeting of the Florida Bar held September 20, 21, and 22, 1973, relating to item 17, the Commission on Revision of the Federal Court Appellate System. Chairman Thomas C. McDonald, Jr., reported, in behalf of the ad hoc committee appointed by President Hadlow, as a representative on the board which attended a hearing on the restructuring of the Fifth Judicial Circuit held September 5, 1973, as follows:

Upon motion made, seconded and carried, the Board endorsed the recommendation by several members of the judiciary who have appeared before the Commission to the effect that a division should be effected within the fifth circuit; recommended that Florida be joined with as few States as is feasible in the judgment of the Commission and that Florida be joined only with States presently in the fifth circuit; and approved the continuance of the ad hoc committee and empowered it to express the Board's views and to assist the work of the Commission in any way possible?

I think that statement of the position of the Board of Governors of the Florida Bar is clearly set forth. The committee felt, and it was the feeling of the Florida Bar, that the fifth circuit should be divided and that Florida should in fact be aligned with one or more States in the new alignment of the fifth circuit.

It was the feeling that Florida should be aligned certainly, with Georgia and possibly with Alabama and Mississippi. From here on I will be giving you essentially my own views, and I would not want them to intrude on the official position of the Florida Bar which I have just set forth.

I have been a practicing attorney engaged in general trial practice in Pensacola. I am a member of a firm that has nine men in it. We practice in Pensacola, which is a little unusual geographically in that we are only 13 miles from the Alabama state line and some 700 miles from Miami. We are closely aligned in many respects with Alabama insofar as our basic location is concerned.

Mr. WESTPHAL. How far are you from Atlanta?

Mr. HARRELL. Do not hold me to this exactly, but I will say something like 450 miles. While we are on that, I can tell you with more assurance we are 1 hour by plane from Atlanta.

I might digress right now to state that it was the feeling of the committee that insofar as oral arguments were concerned, it would be well if oral arguments could be held in perhaps Atlanta, Jacksonville, and Miami. Although I am from Pensacola, I recognize that the bulk of the work of the Florida caseload comes out of Miami. It would be unrealistic for me, even though I am far away, to think that it would not be more feasible for the court to sit in Miami than for it to sit elsewhere. As far as a practicing attorney in Pensacola is concerned, for the convenience of himself and his client, either New Orleans or Atlanta, just an hour, give or take a few minutes, away is best. Oftentimes we have had oral arguments in Jacksonville and, with the present

strike of National Airlines, and even routinely, it is difficult to get from Pensacola to Jacksonville, much more difficult than it is to go to Atlanta or New Orleans.

It is my view that the fifth circuit should be divided, and it would seem logical, certainly, in keeping with the recommendations of the Commission, that Florida be joined with Georgia, Alabama and perhaps Mississippi in a realignment of a new circuit. This would make sense to me geographically.

It would also, I think, facilitate the handling of business because Miami, as I said, has by far the greater caseload in Florida. If we had such an alignment I do not think perhaps—at least in my personal judgment—we would have the problem, suggested by Judge Wisdom, of the proliferation of the circuits which would impair the court structure and lead to provincialism. We, in Pensacola, are as different from Miami, almost, as daylight from dark. We have a different view. We have some alignments which, it seems to me, would lead to a caseload that would give a broad spectrum insofar as the work of the court was concerned, bearing in mind of course, that Atlanta and Georgia are growing, and Atlanta is becoming a business center and sophisticated insofar as business transactions and work are concerned.

It is our feeling that Texas, being, other than Florida, the fastest growing State, logically should be in a separate circuit, partly in order to help meet the problem that you are confronted with.

I am mindful of Judge Wisdom's feeling that there should be no restructuring of the fifth circuit. I have read a copy of his report, which I believe was given on September 24. I can only say that, although I have a great respect for Judge Wisdom, I feel personally that he is too apprehensive in his remarks insofar as his feeling that the whole idea of a strong Federal system of courts would be impaired by the division of the fifth circuit into two circuits.

Last year, I have been given to understand, was the first recent year in which the fifth circuit was behind in its caseload, having some 300 cases to carry over. The court screened 50 to 60 percent of the cases without oral argument. In other cases, the time for oral argument was cut down. As a practicing attorney, a trial lawyer, I personally feel that it would be wiser to screen cases if there is not enough time, and, on the cases which warrant it, give the lawyers a little more time, rather than the 15 minutes, for example, that might be allotted for oral argument.

That is just a personal view. I am mindful of the fact that something has to be given up in the balance, and I only suggest that to you as my personal opinion.

Insofar as the number of judges on the court, 15 judges, it would seem, certainly is stretching the number insofar as the viability of the court is concerned. It would seem that a smaller court, perhaps with 7 judges, 9 judges or 11 judges—something in that area—would be far more workable than with 15 judges, as we now have it.

Also, it has been my experience that, when I appear over there, there is often a district judge, a visiting district judge, who is sitting, which of course increases the number of working judges that they presently have.

I have attended the fifth circuit judges conferences, and I believe that, during the last 4 or 5 years, this particular matter has been a subject that has been alive in a number of sessions during that time.

Everybody recognizes the problem: the larger the court becomes, the more difficulty you have with conflicts among the panels of the court, leading to more en banc arguments, leading to more time-consuming sessions, which are perhaps not the optimum utilization of the judges' time.

The Commission and this committee have heard all of these observations before and I will not intrude on your time further other than just to point out the fact that we have been conscious of this particular problem for some time.

As far as screening is concerned, as a trial lawyer, I would be less than candid if I did not say that, as you look at it, perhaps it may seem all right if John Doe's case is screened out, but when your case is screened out with no oral argument you feel that perhaps your client certainly might well have not had his full day in court as far as the appellate process is concerned. I might add that clients have difficulty in understanding this, too.

Just as an aside, lawyers have to discuss fees with clients. You tell a client that "maybe" you will have to take a trip to Jacksonville, New Orleans, or Atlanta or "maybe" you will not have to. If you have to take the trip, that is another day out of the office, with the attendant expenses, but then you may not go. Of course your client is left with the idea that perhaps his lawyer does not know as much about this appellate process as he should, even though you have explained to him that you have no control over whether or not his particular case will be screened or scheduled for oral argument. That is just one of the practical problems, but it is a real problem to a practicing attorney.

We in Pensacola have, as I have said, some natural affinity with Alabama because of the nearness; geographically we are 60 miles from Mobile. On a number of cases that are handled in the Federal court—admiralty cases in particular—a number of Mobile lawyers practice in Pensacola and a number of Pensacola lawyers practice in Mobile. We work together, and therefore, there is something of a natural affinity.

The same holds true, I am told, with attorneys who are practicing along the border between Alabama and Georgia and, of course, in that section where Florida is contiguous to the Georgia State line. There is something of a natural affinity there geographically.

Our committee felt strongly that certainly, if possible, it would be wiser to make up the new circuit from the States that comprise the present fifth circuit rather than go outside and restructure with States, that, in a sense, were foreign to our present fifth circuit.

Perhaps I have spoken at too much length on all this, so I will not say anything further, but, of course, I would be glad to have you pose any questions that I might answer.

Senator BURDICK. Thank you, Mr. Harrell, for your very useful contribution this morning.

I have just one or two questions. My first one is directed to the resolution that was adopted. All it contained was your bar's wish to keep the new circuit within the States now contained in the fifth circuit. You did not say, however, exactly where the line should be drawn, did you?

Mr. HARRELL. Well, I think that our bar, in all fairness, wanted to leave that to the judgment of you gentlemen and of the Commission,

with the strong feeling that it would be unrealistic for Georgia and Florida to be separated. The two of them would certainly go together. Alabama would naturally fall into that group, and then, of course, we have Mississippi, and Mississippi has, I believe, the smallest number of filings of those four States; certainly Mississippi could fall in with those four States without doing violence to the restructuring, it would seem to me.

My personal feeling would be that that would be a good balance. If you ask what is the next position, well, the next position would, of course, be, as has been indicated in the Commission report, that the three eastern-most States, that is, Florida and Georgia and Alabama be joined.

Senator BURDICK. Well, Mr. Harrell, I raised this because the resolution did not draw the line. But you have been in various judicial conferences and have talked to your fellow lawyers throughout these States. Have you picked up a consensus? Do they favor division at the river, or would they favor placing Mississippi to the west? What kind of consensus is there?

Mr. HARRELL. Well, sir, we have discussed it considerably. Perhaps I am giving you something of a biased view in that I am the western-most member of our committee, the nearest to Mississippi. I married a girl from Mississippi, and I have some natural affinity to Mississippi myself, but there really was no strong feeling about including Mississippi. Perhaps there was some feeling that, as far as the caseload was concerned, if it would create an imbalance in the other direction, Mississippi could well be included.

I'm not sure I have given you much help.

Senator BURDICK. If the lawyers had their choice, as near as you can judge their wishes and desires, would they like to have the four States together?

Mr. HARRELL. I think Florida lawyers, if they had to make the choice, would like to have the three States together; that is, Florida, Georgia and Alabama.

Perhaps that shows some selfishness, because that would be something of a smaller circuit and I think the attorneys on the east coast of Florida feel that they, frankly, have the bulk of the caseload. They would vote for anything that would help them arrange to have more of the courts' work conducted in the south Florida area. Well, perhaps I shouldn't say "vote for anything;" perhaps I should only say they would prefer that.

Senator BURDICK. There has not been any official expression of this preference? It is just your feeling about the subject?

Mr. HARRELL. No, sir, there has been no official expression other than this: In our minutes, they wanted Florida to be joined only with States now in the fifth circuit and with as few States as feasible in the judgment of the Commission.

I think some of the committee members—and perhaps some of the members of the board of governors of the Florida bar—felt that, insofar as Florida was concerned, the fewer States it is aligned with, the better it would be. But I do not suggest that as being a criteria at all.

Senator BURDICK. We heard some argument yesterday about the historical background of the fifth circuit, to the effect that Mississippi, Alabama, and Georgia were once part of one territory.

Mr. HARRELL. Yes.

Senator BURDICK. And that there was a natural feeling that the group ought to stay together, so to speak.

Mr. HARRELL. There is a feeling in our particular area—and I want you to remember that I am speaking about Pensacola, which is the westernmost part of Florida—there is a feeling, shared by some Miami people, that they should have given us over to Alabama and that it was a mistake when we were ever made a part of Florida. We, of course, smile at that, but I want to lay it out for you so you can understand it thoroughly.

We do, perhaps, have a closer affinity with Alabama and Mississippi in Pensacola than we do with Miami or with south Florida or south central Florida—or perhaps even Florida south of Jacksonville and Tallahassee. On the other hand, as a lawyer I recognize that as far as the administration of the court in the future is concerned, it may be more desirable to have the court structured with the three easternmost States. But Mississippi could just as well go with this particular group as could Alabama.

Senator BURDICK. Well, that resolution impresses me; they could not have been too sure where they wanted the line drawn, or they would have said so.

Mr. HARRELL. No, sir.

Well, in fairness, the one thing that I think was the sense of the board of governors of the Florida bar was that they felt the circuit should be restructured, that definitely the fifth circuit should not remain intact with just more and more additional judges being added. In other words, that was the violent consensus. If I did not make that clear to you, sir, I failed. The one thing they felt must be done was that the circuit must be restructured and that the fifth circuit not remain intact, as suggested by Judge Wisdom.

Senator BURDICK. Senator Hruska, any questions?

Senator HRUSKA. I have no questions, but I think we get the thrust of the position of you folks there, and it is helpful to get that.

Mr. WESTPHAL. Just one question, Mr. Harrell.

I am not sure whether the Commission's report reflects it or not, but the Commission did, during its deliberations, as I recall, spend some time toying with the possibility that in the restructuring of the circuits they might restructure every circuit in the country. They gave some thought, for example, to having South Carolina adhere to a circuit with Georgia and Florida. I take it from the resolution of the Florida State bar that it is their sense that they would not favor any such structuring which would bring about an alignment of States from various circuits.

Mr. HARRELL. That is correct.

Mr. WESTPHAL. All right. I think that is all I have.

Mr. Chairman, if the record at this time could include a letter from Judge Paul Roney, dated September 23, and a letter from Judge Goldberg dated September 23, reflecting their views on this issue—

Senator BURDICK. Without objection, they will be received.

[The letters follow:]

U.S. COURT OF APPEALS, FIFTH CIRCUIT,

Petersburg, Fla., September 23, 1974.

HON. QUENTIN N. BURDICK,

U.S. Senator, Old Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: Thank you for the invitation to appear before the Subcommittee on Improvements in Judicial Machinery in connection with S. 2988-2990.

Although I can see no useful purpose in my appearing before the committee, I would like to express this view:

Regardless of what is done in order to afford the Federal Court Appellate System a full opportunity to discharge its responsibilities, and regardless of the salutary effect that any proposal which I have heard to date might have in relieving the current overload in the Fifth Circuit, our Circuit will have to be divided in the foreseeable future if the number of judges on the court is not to exceed 15, and if the court is not to fall hopelessly behind. Since a split of the Fifth Circuit, together with the addition of three judges to make a total of 18, will offer some immediate relief and is inevitable in any event, I am in favor of dividing the Circuit now.

Essentially, I am in accord with the conclusions of Judge Walter P. Gewin, who will be testifying before the Subcommittee tomorrow.

Best regards,

PAUL H. RONEY, *Circuit Judge.*

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT,
Dallas, Tex., September 23, 1974.

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Without any reservation whatsoever I wish to associate myself with Judge Thornberry's letter of September 19, 1974.

In my opinion it would be nothing short of catastrophic to saddle the six "Western Circuit" judges with the caseload that would be cast upon them if Alternative No. 2 were adopted.

Sincerely and respectfully yours,

IRVING L. GOLDBERG, *Circuit Judge.*

Senator HRUSKA. I presume, Mr. Chairman, that our witness will supply us with a copy of that resolution for insertion in the record.

Mr. HARRELL. Yes, sir, I will be glad to do that.

[The material follows:]

MINUTES OF REGULAR MINUTES OF THE SEPTEMBER 20, 21, 22, 1973, MEETING OF
THE BOARD OF GOVERNORS OF THE FLORIDA BAR

ITEM 17: COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

Chairman Thomas C. McDonald, Jr. reported in behalf of the ad hoc committee appointed by President Hadlow to represent the Board at a hearing on the restructuring of the Fifth Judicial Circuit held September 5, 1973. Mr. McDonald reported that the commission was activated in June and is to submit its report in December 1973.

Upon motion made, seconded and carried the Board endorsed the recommendation of the several members of the judiciary who have appeared before the commission to the effect that a division should be effected within the Fifth Circuit; recommended that Florida be joined with as few states as is feasible in the judgment of the commission and that Florida be joined only with states presently in the Fifth Circuit; and approved the continuance of the ad hoc committee and empowered it to express the Board's views and to assist the work of the commission in any way possible.

Mr. Clayton asked that the special ad hoc committee investigate the possibility of establishing a Federal Criminal Court in Gainesville. President Hadlow directed him to prepare the facts and submit them back to the Board for further consideration.

Senator BURDICK. Thank you very much, Mr. Harrell.

Mr. HARRELL. Thank you.

Senator BURDICK. The committee will be in recess until next Tuesday at 10 o'clock.

[Whereupon, at 10:50 a.m., the committee recessed, to reconvene Tuesday, October 1, at 10 a.m.]

CIRCUIT REALIGNMENT

TUESDAY, OCTOBER 1, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 6202, Dirksen Senate Office Building, Senator Quentin N. Burdick [chairman of the subcommittee] presiding.

Present: Senator Burdick.

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. Today we commence the second week of hearings on S. 2988, S. 2989 and S. 2990, which embody the recommendations of the Commission on Revision of the Federal Court Appellate System to the effect that both the fifth and ninth circuits be geographically realigned as a means of improving the administration of justice in those two circuits. Our hearings this week will concentrate on the conditions existing in the ninth circuit and on the various proposals which have been advanced as potential solutions to the problems in the ninth circuit.

During the past 4 fiscal years the number of appeals filed in the ninth circuit has increased from 1,936 cases in 1971 to 2,697 cases in 1974. Of this increase of 761 cases, 381 occurred in fiscal year 1974. During this period of time the filings per judge for a court of 13 judges have increased from 149 cases per judge in 1971 to 207 cases per judge in 1974. While it is true that the terminations have also increased, from 133 per judge in 1971 to 196 per judge in 1974, nevertheless this court has steadily built up an ever-increasing backlog of cases pending.

Last week we studied the situation in the fifth circuit, a circuit which has employed virtually every expediency conceivable, *except* a resort to oral decisions from the bench and the regular employment of an active district judge or a visiting judge in the composition of each three-judge panel.

In contrast, the ninth circuit appears to be a circuit which has attempted to afford as much oral argument as possible to the litigants in as many cases as possible but has been able to do so only by employing 40 active district judges from within the ninth circuit together with 10 senior district judges from within the ninth circuit as the

third members of three-judge panels. In fiscal year 1973 these 50 district court judges furnished 198 days of judge time sitting on panels of the Ninth Circuit Court of Appeals. While the 12 active judges of this court averaged 48 days per judge of panel sittings, a figure second only to the second circuit, the calendar of the court scheduled an average of only 3.3 cases per day for hearing or consideration by each panel, which is the lowest number of cases heard per day by any of the 11 circuits.

As previously stated, by use of active district judges plus the services furnished by other assigned and visiting judges this circuit received 336 days of judge time during fiscal year 1973. This is the equivalent of seven full-time judges, so that in fiscal year 1973, even with one vacancy in its authorized complement of 13 judges, this court operated with the equivalent judge power of 19 full time judges. Nevertheless, in fiscal year 1973, it terminated 176 cases less than were filed, and in 1974 it terminated 146 cases less than were filed. While this court has endeavored to keep up with its criminal caseload, it is reputedly 2 years behind in its civil caseload.

As shown by committee exhibit E-12, in fiscal year 1973 the average time from notice of appeal to release of the court's opinion in cases which were determined by a signed opinion after oral argument, the average time was 528 days, a figure which was exceeded only by the District of Columbia Circuit.

The purpose of this factual summary is neither intended, nor should it be construed, as any criticism of the effort made by the 13 judges of this court to solve the host of problems which arise from the large number of appeals generated from the nine States and one territory encompassed by this circuit over a large land mass. It may be that the caseload problems of the ninth circuit as presently composed may be beyond the capacity of any given number of judges to administer in an efficient manner. Whether or not there would be a significant increase in efficiency as a result of geographical realignment is a question which the Congress shall have to determine. The ninth circuit problems, in all their dimensions, are the subject of our hearings this week.

Before calling our first witness I will include in the record, without objection, committee exhibits A-2, B-2, C-2, D-2, E-5, E-9, E-12 and F. There will also be included in the record a copy of remarks of Mr. Warren Christopher, president of the Los Angeles Bar Association and former Deputy Attorney General of the United States, two letters from Judge Alfred T. Goodwin of Portland, Oreg., dated September 25, and 27, 1974, and a letter from Judge Eugene A. Wright of Seattle, Wash., dated September 23, 1974.

[Editor's NOTE. Committee exhibits A-2, B-2, C-2, D-2, E-5, E-12, and F are hereby incorporated by reference from that section of this record which reports the proceedings held on September 24, 1974. Committee exhibit E-9, the remarks of Mr. Warren Christopher, and the letters from Judges Goodwin and Wright follow:]

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case - F.Y. 1973

Circuit: Ninth

Circuit: Ninth

Type of Case and Opinion	Number of Cases	Av. Time Appeal-Record (days)	Av. Time Record-Last Brief (days)	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Average Time Appeal-Opinion (days)	Remarks
U.S. Civil - Signed Opinion	62	95	155	327	131	715	
Per Curiam	53	102	146	216	25	506	
Memorandum	-	-	-	-	-	-	
No Opinion	12	114	165	410	24	733	
Private Civil - Signed Opinion	107	105	169	329	148	757	
Per Curiam	111	93	165	344	55	664	
Memorandum	1	61	39	79	-	213	
No Opinion	28	113	127	216	14	504	
Prisoner Pet. - Signed Opinion	37	52	111	139	84	440	
Per Curiam	89	87	97	78	13	319	
Memorandum	-	-	-	-	-	-	
No Opinion	13	90	151	57	2	311	
Criminal - Signed Opinion	231	118	72	56	38	354	
Per Curiam	365	93	69	46	26	43	
Memorandum	-	-	-	-	-	-	
No Opinion	57	117	57	39	24	247	
Admin. Agency - Signed Opinion	53	16	170	271	86	597	
Per Curiam	53	20	121	210	23	444	
Memorandum	-	-	-	-	-	-	
No Opinion	24	15	117	204	27	389	
Recapitulation							
All Signed Opinions	504	94	119	187	112	528	
All Per Curiam	697	87	100	134	30	365	
All Memorandum	1	61	39	89	-	213	
All No Opinion	141	94	103	159	19	387	
Circuit Average	1343	90	108	156	60	428	

ROOM 3600, 611 WEST SIXTH STREET,
Los Angeles, September 23, 1974.

WILLIAM P. WESTPHAL, Esq.,

Chief Counsel, Subcommittee on Improvement in Judicial Machinery, New Senate Office Building, Washington, D.C.

DEAR BILL: On checking my calendar for October 1, I find that I am scheduled to be in an important series of meetings here with the Chief of Police, the Superintendent of Schools, and other local officials on juvenile justice problems which have been plaguing our community.

Thus, with great regret I must decline to accept your invitation to appear at the hearings on circuit revision. Fortunately, State Bar President Brent Abel will be appearing and will express views which I believe are largely consistent with mine.

For your information and file, I am enclosing a copy of a speech on the circuit issues, which I delivered to the Chancery Club of Los Angeles entitled "Don't Divide California".

With regards,

Sincerely,

WARREN CHRISTOPHER.

REMARKS OF WARREN CHRISTOPHER DELIVERED IN A SPEECH TO THE CHANCERY CLUB OF LOS ANGELES, MARCH 1974

[Mr. Christopher is a member of the law firm of O'Melveny and Myers, 611 West 6th Street, Los Angeles, California. Currently he is President of the Los Angeles Bar Association. Formerly he was Deputy Attorney General of the U.S. (1967-1969) and has held a variety of other government offices, both State and Federal.]

DON'T DIVIDE CALIFORNIA

There is more mischief than merit in the recent proposal that would divide California in the process of dividing the Ninth Appellate Circuit into two separate circuits.

The plan, being advanced by a Federal Commission, would place the Northern section of California in a new Twelfth Circuit, while the Southern portion would remain in a realigned Ninth Circuit. While the arguments for realignment of circuit boundaries are strong, on balance I think the proposal that would divide our state entails serious disadvantages that far outweigh the benefits. The circuit, in my view, can be divided without dividing California.

I. PREVIOUS ATTEMPTS TO DIVIDE THE STATE.

The idea of dividing California, politically or otherwise, is not new. Attempts to split California are as old as the state itself. These efforts, which have always failed, provide some historical perspective for the current proposal.

As early as 1850, when California was admitted to the Union there was a threat of division. Southern senators sought to preserve the balance between slave and free states by demanding that the Missouri Compromise line be extended to the Pacific. That proposal would have severed California just south of Monterey. But a "great compromise" was worked out and California was admitted in its entirety as a free state. In the bargain, Utah and New Mexico were organized as territories without a ban against slavery.

This was only the beginning in a series of attempts to divide the state. Shortly after Admission, there was a strong movement for separation that arose in the southern counties—then called the "Cow Counties". This time the motivation was different—too much taxation and too little representation. In those years, the six southern counties with a population of 6,000 paid twice as much in property taxes as the six northern counties with a population of 120,000.

So in 1851, a "Convention to Divide the State of California" was convened in Los Angeles. Pronouncing the state government a "spendid failure", the Convention resolved that the political connection of the North and South is "beneficial to neither and prejudicial to both".

Another effort to carve away part of the state came closer to success in 1859. Andres Pico obtained approval from the legislature to incorporate the counties from San Luis Obispo south as the "Territory of Colorado". However, the Civil War broke out before congressional approval could be obtained, and the project was blocked.

As a footnote, I might mention that another of the early proposals for division would have formed a state south of the Tehachapis with the name "South Cafeteria".

In the 20th Century, Southern California continued to chafe over the distribution of power as well as uneven taxation, and proposals for division continued to be heard. The most serious recent proposal for bifurcation came in 1964 in the wake of a series of Supreme Court one person-one vote cases. Faced with the prospect of reapportionment, northern senators proposed a division of the state at the Tehachapis. However, polls showed that more than two-thirds of the voters even in the North were opposed to division, so the proposal never got off first base.

While one can understand the motivation of those who sought the division at various times in our state's history, I think we would all agree that the right result obtained. Providence seems to have intended that California should be a great state with a great people and a great destiny.

II. COMMISSION'S PROPOSAL TO DIVIDE THE NINTH CIRCUIT.

The latest proposal for a division of California comes neither from Southern or Northern California but from the Commission on Revision of the Federal Court Appellate System. The Commission was created in 1972 (P.L. 92-489) in response to near unanimous observation by scholars, lawyers and judges that the Court of Appeals, as a national institution, is suffering from overload.

Consider these hard statics: In 1960 there were 57 appellate filings per existing judgeship, while in 1973 the number had tripled to 161 per judgeship, in spite of the creation of 28 additional judgeships. The Fifth Circuit has expanded to 15 judges and the Ninth to 13. Case loads are heavy, and backlogs have become intolerable.

In the first phase of its work, the Commission was directed by Congress to recommend changes in the geographical borders of the circuits. Specifically, the Commission was given 180 days, ending December 18, 1973, to make proposals.

In the second phase of its work the Commission is continuing to study the structure and internal procedures of the Court of Appeals with recommendations due at the end of 1974.

Some perceptive observers, such as Judge John Minor Wisdom of the Fifth Circuit, think that Congress may have put the cart before the horse by seeking to redraw Circuit Court boundaries without first considering the more fundamental questions of internal structures and procedures. This observation has a good deal of force to it, but the exhaustive study of the Commission on the first phase has been completed and we have before us its recommendations.

In summary, the Commission has concluded that, for now, only the Fifth and Ninth Circuits require major surgery. While the problems of the realignment of the Fifth Circuit are distinct and interesting, I am sure you will not be surprised to hear that it is our own Ninth Circuit upon which I intend to focus today.

The Ninth Circuit is massive, extending from the Arctic Circle to the Mexican Border, and from Montana to Guam. At the end of fiscal 1973 there was a backlog of 170 cases per judge, enough to keep the court busy for a year if no new cases were filed. Even with the steady stream of visiting judges from other Circuits and District Judges sitting by designation, the thirteen currently-authorized judges have simply been overwhelmed by the increase in appellate filings. Thus, the backlog continues to grow. Indeed, in the first six months of fiscal 1974 the backlog rose to 194 per judge.

The foregoing raw statistics, which amount to over a fourfold increase in appellate filings in ten years within our own Circuit, translate into some very significant practical changes in appellate practice. Oral argument is cut down, sometimes cut out. The time gap between District Court decision and Court of Appeals argument grows. In the Ninth Circuit, as Judge Duniway observed, the gap may be as much as two years in civil cases.

In addition, unsigned or per curiam opinions have become the rule rather than the exception. While some might argue that this terseness is a welcome sign of judicial economy at the appellate level, it is, quite to the contrary, evidence of an overburdening of the appellate courts that threatens the quality of appellate review.

It is in the context of this urgent need for relief that the Commission has made the basic recommendation that the Ninth Circuit should be reconstituted into two new circuits:

(1) A new Twelfth Circuit to consist of the Southern and Central Districts of California, the states of Arizona and Nevada, and

(2) A new Ninth Circuit to consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California.

Some criticize the plan as a palliative, suggesting stronger medicine as the only hope; some say the division of the Circuit will impede further substantive reform; and others suggest that the situation, while critical, simply should be left alone. For my purposes, I am willing to regard some division of our present Ninth Circuit as inevitable—"a given"—and a prudent one, too.

III. THE DANGERS OF DIVISION

The problem, as I see it, is not with the concept of a new circuit, but with the method of achieving it. We urgently need to redistribute the case load of the Ninth Circuit, but not at the expense of other important values—not at the cost of making California half Ninth and half Twelfth. I believe that the bifurcation of California would create some very substantial problems, though in saying so I recognize I am differing with some eminent Court of Appeals judges who have both my friendship and respect.

A. The Potential for Inconsistent Judgments

One of the most serious problems created by dividing California into separate circuits involves the potential for inconsistent judgments in cases involving the same parties and the same issues, but brought in different parts of the State. I am sure that each of you can easily call to mind what are essentially single disputes but where the parties have invoked the jurisdiction of the federal courts in both San Francisco and Los Angeles.

In a divided California, such situations would almost inevitably result in the waste of judicial time in litigating separate appeals in separate circuits. More important, one or more parties might be subjected to confusing or altogether inconsistent obligations, imposed by inconsistent judgments in the two branches of the litigation. A litigant may find himself in the intolerable situation where he cannot avoid disobeying one judgment or the other.

It can be no answer that the United States Supreme Court is available to resolve disparate judgments, for the High Court itself is struggling with the sharp increase in its own case load. Civil cases that are not of national concern, in spite of the amount in controversy or the importance of the litigants, are seldom regarded as worthy of hearing in the Supreme Court. With no procedural device similar to a rehearing *en banc*, the parties would be left to try to cope with directly conflicting or at least confusing judgments.

B. Conflict of Decisional Law—Diversity Litigation

In addition to the possibility of inconsistent judgments against a party, there is the more pervasive and equally serious problem of conflicts as to the legal rules applicable in a given situation. Perhaps this can be most easily seen in connection with the application or interpretation of state law in the federal courts. If California were bifurcated, it is entirely conceivable that the Northern Circuit would interpret California law in one way, whereas the Southern Circuit would interpret it in an opposite or significantly different way.

Again, the availability of the Supreme Court is not a sufficient protective device. The Supreme Court's custom, in diversity cases, is to accept a Court of Appeal interpretation of the law of any state within the circuit. Thus, litigants in different federal courts in California could be subject to different rules, and there is no guarantee that either would conform even to state interpretations. All this would lead to much uncertainty, unequal treatment, and a particularly unattractive inducement to forum shopping.

It has been suggested that since it is state law that is involved, the difficulty to which I have referred could be resolved by a liberal dose of abstention on the part of the federal courts. Abstention certainly has its place, particularly with respect to novel state constitutional questions and cases removed to federal court with only a tenuous federal jurisdictional base. But this doctrine has limited application to diversity cases where litigants have a federally-created right to the availability of a federal forum.

In diversity litigation, state law seldom seems to fit exactly the facts of a new case. So many new cases seem to involve previously unlitigated issues stemming from our complex, interdependent, and technologically advanced society. Thus,

the federal courts are required to exercise their judgment and wisdom, rather than simply applying state law by rote. This, in my view, is the way it should be, and I think it would be as unwise as it is unattractive for the federal courts to have to shrink from a duty imposed by Congress and recognized by the Supreme Court since 1938.

I doubt there is any constitutional infirmity in the proposed plan to split California. But I cannot help wondering whether the Framers of the Constitution intended the federal system to be so fragmented that citizens of the same state would be bound by differing federal court interpretations of their own law.

C. Conflict of Decisional Law—Federal Question Jurisdiction

The conflict of legal rules, of course, applies to federal as well as to state law. If the two circuits in California should interpret federal law in different ways, there would be the prospect that California citizens would be treated differently depending upon where their cases were brought. Arguably, this is no worse than conflict among circuits which are located at opposite ends of the country, but I am not at all sure that this is so.

Indeed, when we picture the many federal laws which may be peculiarly applicable to a single state, it seems inadvisable to encourage a situation in which persons are subject to different rules of law simply by virtue of where they live or happen to be travelling in their home state.

The potential for diverse interpretation is not imaginary. For example, both federal and state welfare laws are subject to much litigation these days and it is easy to conceive of the southern circuit in California reaching a result in direct conflict with that of the northern circuit on an important legal issue of statewide importance.

To give another example, there is increasing litigation involving the rights of prisoners in our state institutions. Once again, it is not at all difficult to envision a situation in which the southern circuit in California would uphold certain prisoner rights in an action against the State Director of Corrections, while the northern circuit was denying the same or comparable rights. Who would argue that this would be a desirable situation?

Corporations, both public and private, operating on a statewide basis would face the same dilemma. Take one of our statewide banks for example. An action brought against a bank in the northern circuit might establish a certain right for depositors which could be denied in a comparable case in the southern circuit. Yet, neither case might be worthy of certiorari, and the bank would be left to face the inconsistent decisional rules.

I have only suggested some of the areas in which inconsistent decisions between the newly-created circuits would cause a serious disruptive effect. Federal labor, tax, antitrust, and environmental laws might also be interpreted with varying degrees of inconsistency. So the present task of advising a client on a complex legal matter involving its operations in this state would be greatly complicated by the division of the state into two circuits.

D. Techniques To Minimize Conflict

I recognize, of course, in addition to abstention and remand, there are a number of techniques which might be used to help prevent such inconsistent judgments or a conflict of legal rules. These include transfer of venue under 28 U.S.C. § 1404 (a), multidistrict handling under § 1407, injunctions against litigation in another district, and stay of proceedings. These techniques would be helpful in lessening potential problems if California had to be divided. But they were designed for a different purpose, and very often they seem to result in delay and expense which is justified only in the most complex cases. By my lights, these techniques at best would be a cumbersome and expensive way of dealing with a problem which never need arise.

The staff of the Commission on Revision has also suggested that if Congress decides to bifurcate California, "it might be well advised" to set up a special procedure for resolving certain issues. The suggestion is that litigation involving a particular state statute or rule should be channelled to a single District Judge drawn from either circuit, who would handle the case through both discovery and trial. That is only the beginning of the problem, however, for then Congress would have to provide a special appellate panel to hear the appeal, perhaps chosen by the Chief Justice from the two circuits in the state. In effect, we might end up having three new circuits, the third being a tie-breaker for California cases. I doubt the advisability of such a procedure, but by advancing it, the staff of the Commission does seem to confirm my estimate of the gravity of the problem of splitting California.

E. A Fundamental Danger

In addition to the somewhat technical problems I have discussed, bifurcation would have a more fundamental danger. It would breed a sense of separation in our state, exactly contrary to the direction in which we should be moving. It would encourage Northern California to a new isolation and thus a new insularity. After having resisted political division of the State for more than a century, wouldn't it be most unfortunate to take this backward step in the judicial field.

IV. ALTERNATIVE PROPOSALS

A. California as a Separate Circuit?

I have spent a good deal of time explaining why I think the division of the state between two circuits is an idea that bears a heavy burden. No other state in the United States is divided between two circuits. With this in mind I would like to discuss for a moment an alternative—also unique and untried—that would solve many of the problems of case overload. The idea, which was considered and rejected by the Commission, would create a separate Circuit Court of Appeals composed only of the State of California.

The Commission apparently believes that if California were a one-state circuit, it would lack the diversity of background and attitude brought to court by judges who have lived and practiced in different states. On this score, the Commission just may not know California and its federal judiciary.

Consider a few of the judges from California on the Ninth Circuit. There is Walter Ely who lived and grew up in Texas and would bring quite a lot of diversity to any group! Then, there is Shirley Hufstедler who grew up in New Mexico and who would bring both distinction and distinctiveness to any group of judges. And who would say that Judge Wallace and Judge Duniway are two peas in a pod? In almost every respect, California is as diverse as the nation, and I am confident it would produce plenty of diversity in its judges.

Moreover, California as a separate circuit would fare well in comparison to circuits such as the Second, which is made up of only Connecticut, New York, and Vermont. In the Second Circuit, 8 of the 9 authorized judges either practiced law or was a Federal District Judge in New York before appointment. Moreover, cases from New York District Courts made up 75% of the appellate filings in 1972.

The Commission also argues that if California constituted a single federal circuit, only two senators from a single state would be consulted in the appointment process, and a single senator of long tenure might have a great deal of influence. This brings to mind some valid questions about senatorial influence on appointments which have been raised by Elliot Richardson. His views no doubt deserve a hearing and they may lead at some future date to overall reform of the selection process. Yet if we retain the senatorial system—and it seems likely we will—my experience leads me to question whether there is any great danger in seniority, or any inherent safety in numbers in connection with judicial appointments.

As a very broad generality, the more senior a senator is, the better his suggestions for appointment tend to be. Perhaps this is because a senator, re-elected over a period of time, develops more independence from his political obligations.

As to the Commission's suggestion that there is safety in numbers, I may observe that the high quality the California state judiciary owes a good deal to the fact that it reflected for a relatively long period of time the appointments of a single man, Governor Earl Warren. Moreover, the relatively long influence of Governors Brown and Reagan has, on the whole, been healthy. So, I am inclined to think that, as usual, it is quality, not quantity that counts.

Another reason advanced against having California as a single circuit is that 60% of the Ninth Circuit case load comes from California, and so it is argued that it is essential to divide the state in order to spread the case load between two circuits. This point has weight, but it is also worth remembering that the birthrate has dropped remarkably in California in recent years, and there are other indications that the population influx from outside the state has leveled off.

Moreover, California's case load can be spread among more than nine judges. A nine judge maximum may have symmetry about it, but there is no magic in that number. California as a circuit should probably have more than nine judges, but this is not reason enough to split the state.

Finally, it seems likely to me—and this is perhaps mainly intuition—that if California were a circuit, the cohesiveness of the Court and the proximity of the judges would result in marked efficiencies in handling the case load.

B. California Grouped With Other States

If there is any great problem about a circuit consisting of a single state, the matter can be at least partially corrected. Nevada could be added to California without any substantial increase in the case load of the circuit. Under such a plan, Arizona might be transferred to the Tenth Circuit, so as to assure that the circuits are made up of contiguous states. I would not recommend this, but if there is a fixation that a single state not be a circuit, it would still not justify splitting California.

V. CONCLUSION

One is always hesitant—and rightly so—to challenge the recommendations of a Commission, which is made up of a distinguished and able group of judges, lawyers, scholars, and elected officials. As you probably know, the Commission consists of four members appointed from the Senate (Senators Burdick, Gurney, Hruska, and McClellan), four members appointed from the House (Congressmen Brooks, Flowers, Hutchinson, and Wiggins), four appointed by the President (Emanuel Celler, Dean Cramton, Francis Kirkham of San Francisco, and Judge Sulmonetti), and four appointed by the Chief Justice (Judge Lumbard, Judge Robb, Bernard Segal, and Professor Wechsler). In addition to this outstanding lineup, it needs to be added that the Executive Director of the Commission is Professor Leo Levin of the University of Pennsylvania Law School, the co-author of a leading case book on federal civil procedure.

With all respect to this outstanding Commission, I beg to differ on the division of California. The problems arising from bifurcation—problems such as inconsistent judgments and conflicting versions of state and federal law—are, in my view, real and substantial. They outweigh the difficulties—minor difficulties in my view—of having a circuit consisting solely of California. I hope Congress will see it as I do and, once again, keep California together.

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
CHAMBERS OF ALFRED T. GOODWIN, U.S. CIRCUIT JUDGE,
Portland, Oreg., September 25, 1974.

MR. WILLIAM P. WESTPHAL, *Chief Counsel,*
Subcommittee on Improvements In Judicial Machinery,
Dirksen Office Building, Washington, D.C.

DEAR MR. WESTPHAL: I am sorry that I was out of the office when you called and I am even more sorry that I cannot come to Washington the week of October 1st to appear before the subcommittee. We have set a full calendar of oral arguments in Los Angeles for that entire week, and I am scheduled to sit on four of the five days beginning September 30.

As you know, the problem of the Ninth Circuit, is essentially a problem of what to do about California. California by itself produces more than two-thirds of the work of the circuit, and the projected future case-load coming out of California will be greater than it is today, both in gross figures and in proportion to the rest of the Ninth Circuit. I think S. 2988, 2989, and 2990 deal realistically with the Ninth Circuit. The distinguished commission gave a lot of thought to the problem of California, and the commission's proposed solution makes good sense. Whether it will be well received by the people who make political decisions affecting California is another matter.

Maybe what we need is fewer circuits rather than more circuits, or the abandonment of the circuit structure and development of a new administrative technique for putting the necessary judges where the cases are to be heard.

I would not be alarmed at the prospect of one national court of appeals under centralized administration, so long as the administration remains responsive to the needs of the various districts. Because the Ninth Circuit has been a borrowing circuit and has had the benefit of assistance from senior judges from other circuits. I have personally sat on panels with judges from the First, Second, Third and Fifth Circuits within the last three years. In most of the cases, the questions were federal questions, and the regional origins of the judges were wholly irrelevant. As far as travel is concerned, we can probably forget some of the folklore that we learned during the days of horse and railroad. It is as

easy to go from Portland to New York, or from Philadelphia to Los Angeles, as it is to go from Portland to Billings or Spokane. And the cost of moving judges around is probably a relatively minor cost in the total budget for civilian government.

In conclusion, I support S. 2988 as a temporary measure and suggest further study be given the need for the separate circuits.

Sincerely,

ALFRED T. GOODWIN,
U.S. Circuit Judge.

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
Chambers of Alfred T. Goodwin, U.S. Circuit Judge,
Portland, Oreg., September 27, 1974.

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: While I am on record in support of the report of the Commission on Revision of the Federal Appellate Court System (as the lesser of several evils), I want to make it clear that I favor fewer, rather than more circuits.

Judge John Kilkenny of the Ninth Circuit, convinced that the splitting of California into two circuits is politically unlikely as well as undesirable, has suggested a relatively minor administrative change that would save the Ninth Circuit, and at the same time create an experimental laboratory for observing an alternative administrative model. The northern and southern division scheme, however, has not commended itself to the Commission, at least in part because of its lack of nationwide application. I have been advised that it is a lost cause, but I still think the Kilkenny plan is superior to the creation of more circuits.

In any event, the geographical area now served by the Ninth Circuit needs at least eighteen judges to hear and decide the cases presently being produced in the region, and any solution which fails to provide sufficient manpower, in my judgment, would fail of its purpose.

Sincerely,

ALFRED T. GOODWIN,
U.S. Circuit Judge.

U.S. COURT OF APPEALS, NINTH CIRCUIT,
EUGENE A. WRIGHT, JUDGE,
Seattle, Wash., September 23, 1974.

HON. QUENTIN N. BURDICK,
Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR SENATOR BURDICK: Because of a conflicting court calendar in Los Angeles early next month, I shall be unable to attend the hearings to be conducted by your committee on circuit revision. At Mr. Westfall's suggestion, I would like to present my views.

I testified in Seattle before the Commission on Revision of the Federal Court Appellate System in August 1973. I said at that time that:

- (a) There was an immediate and urgent need to divide the Ninth Circuit.
- (b) That the Commission and the Congress should be planning ahead for at least 20 years.
- (c) That there was justification for the creation of a new circuit in the Pacific Northwest.

Those are still my views and they have been reinforced by some recent events.

A year ago some of us reported that the judges of the Ninth Circuit sat en banc rarely because of the difficulty of gathering all 13 active judges in one courtroom at a specific time. Members of the bar had charged the court with having released a number of conflicting opinions which needed to be reconciled by rehearings en banc.

Since that time we have taken many cases en banc, some for the reasons suggested by the bar. In one situation, conflicting and totally irreconcilable opinions had been filed within one week, each by a three-judge panel which was unaware of the case under consideration by the other. But, the en banc process consumed many more months and the en banc opinions in the two cases have not yet been filed.

There have been other examples which make the same point. The fault is not with any judge or with the administration of the court. The circuit is just too large and there are too many judges to administer and too many opportunities for errors. Simultaneously the court can be sitting in three cities, often with district judges filling out the panels. One panel has no way of knowing the nature of the cases being heard by the others. The district judges who assist us are unaware of most correspondence and intra-court memoranda on general subjects.

So, my conclusion from all of this is that the court is unwieldy, that it must be broken up in some way, that a court of nine judges in active service is the absolute maximum that can be organized and administered efficiently, and that courts of five, six or seven judges would be more desirable.

The bar has quite properly charged us with delay, and the results of accumulating backlogs of civil cases which have been briefed and ready for argument 12 to 18 months before we have reached them. Such delay has been costly to the public, litigants, lawyers, as well as to us on the court. When we prepare for oral argument and read briefs which are 18 months old, we can assume that the law has changed, that the lawyers have long since forgotten the case and will not argue before us with clear and present memories of the trial scene, and that the extended delay may have even caused the appeal to abort.

Again, the fault is not with the court. New appeals have engulfed us. Our production has increased, but not fast enough. It is obvious to me that adding more judges to a circuit already too large is not an answer.

A year ago I suggested to the Commission that we can expect an increase in judicial business and in appealed cases in the Pacific Northwest. I believe that I am correct, but I must depend upon others to supply the figures. Here in Seattle it is clear to us that federal litigation in Alaska will increase tremendously within five years. Seattle's harbor is filled with ships and barges heading north. Commercial airlines bound for Alaska cities are traveling full. Soon we shall see floods of cases in such fields as environmental law, civil rights, the problems of the Alaska natives, and the inevitable load of criminal prosecutions.

It makes sense to me to have argued in the Pacific Northwest the cases coming up on appeal from those states. Travel time for lawyers can be saved. With lawyers' hourly rates for appellate work now at \$100 per hour or more, it is unfair to counsel and their clients to require more travel time than necessary. It is unfair to the lawyers and citizens of the less populous states to deny them speedy administration of justice by making them wait in line behind appeals coming up from the nation's most populous state.

Thank you for giving me the opportunity to present my views.

Sincerely yours,

EUGENE A. WRIGHT.

Senator BURDICK. We will now call as our first witness the Honorable Ben Duniway of San Francisco, a Judge of the Ninth Circuit Court of Appeals.

STATEMENT OF BEN CUSHING DUNIWAY, JUDGE, NINTH CIRCUIT, SAN FRANCISCO, CALIF.

Judge DUNIWAY. Thank you, Mr. Chairman. I am pleased to be able to be here to discuss the ninth circuit.

You have summarized a good many of our problems. We are well aware of them, and have been working very hard to increase the disposition of our cases.

I have prepared and handed to Mr. Westphal a written statement of my position. I don't intend to repeat all that is contained in that statement unless you desire that I do so, but there are some rather distinguishing aspects of this matter which I think are unique to the ninth circuit, and I would like to address my remarks to those aspects.

Senator BURDICK. Judge, your prepared statement will now be incorporated into the record in full and you may proceed to present your views in any manner you wish.

[The full text of Judge Duniway's prepared statement follows:]

PREPARED STATEMENT OF BEN. C. DUNIWAY, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Mr. Chairman and Members of the Subcommittee: My name is Ben. C. Duniway and I am a United States Circuit Judge, an active member of the United States Court of Appeals for the Ninth Circuit. I have been a member of the court for thirteen years, and before that, I was a Justice of the District Court of Appeal, First District, Division One, of the State of California at San Francisco. I began the practice of law in San Francisco in 1933, and practiced there, except for a five and one-half year interval as a government attorney and administrator during World War II, until 1959.

I appear before you in support of the Recommendation of the Commission on Revision of the Federal Court Appellate System that the Ninth Circuit be divided into two circuits: a new Twelfth Circuit embracing the Central and Southern Districts of California and the states of Arizona and Nevada, and a new Ninth Circuit embracing Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California.

I am in hearty agreement with the Commission's statement that:

Such a realignment will by no means solve all of the Ninth Circuit's problems for all time, but it will make them more manageable in the short run and establish a sound geographical base on which to build more fundamental reforms.

I am convinced, after serving on the Court of Appeals for the Ninth Circuit for thirteen years, that the Circuit must be divided, regardless of anything else that may be done to reduce the workload of the United States Courts of Appeals. Anything that can sensibly and reasonably be done to reduce our workload, such as limiting the jurisdiction of the Federal Courts in ways that will not deprive persons who ought to have a Federal forum of that forum, or such as devising better methods of considering and deciding the cases that come before us, will be welcome. We are ourselves already hard at work on the latter job. But I personally am convinced that the Ninth Circuit's caseload is now so large that we can no longer function as a Court of Appeals ought to function. I am also convinced that one of the factors that makes our job so hard to do properly is the very large area from which our cases come. In short, I believe that two factors—geography and caseload—have combined in the Ninth Circuit in such a way as to make it well nigh impossible for us as judges to do the kind of job of considering and deciding cases that the litigants, the bar, and the public generally are entitled to expect of us. While the two factors interact, I believe that it will be helpful to consider them separately.

1. GEOGRAPHY

a. Size

We are by far the largest Circuit geographically. We extend from the eastern border of Montana to Guam, and from the Mexican border to Point Barrow, Alaska, north of the Arctic Circle. California is the nation's largest state in population, and the third largest geographically. It produces over 65% of our cases, and it has six of the Census Bureau's 50 major metropolitan areas of the nation, including Los Angeles, the second largest, and San Francisco, the sixth largest. Other major areas are San Diego, California, Phoenix, Arizona, Portland, Oregon, Seattle-Tacoma, Washington, and Honolulu, Hawaii.

b. Travel

Distances from San Francisco, our headquarters, are great. This means that the court travels extensively. We believe that litigants in distant places ought not to have to bear the heavy expense of travel to San Francisco. We sit regularly in San Francisco (12 months), Los Angeles (11 months), Portland-Seattle (3 months), Alaska and Hawaii (1 month each). In Los Angeles two panels sit each day for a week. In San Francisco three panels sit each day for a week. In the Northwest, Alaska, and Hawaii a single three-judge panel sits each day for a week. All of this means extensive travel for all of us, and travel uses valuable

time. We do not believe in "local" panels; so all of us travel. Each active judge is expected to sit about the same number of times as each other active judge, in each place where we sit.

Every time the court sits away from San Francisco, someone from the clerk's office (usually two) must travel. So must the briefs and records in all of the cases to be heard. This greatly reduces the efficiency of the clerk's office.

Because we only sit for a week each month in each city, most of us do not take our secretaries or law clerks with us when we travel; they have plenty to do at home, and travel reduces their hours of actual work. Moreover, both we and they are more efficient at home. That is where we have our personal libraries, our files, and our equipment. So we are less effective when away from home.

c. Scattering of judges

As of October 8, we will have twelve active and five senior judges and one vacancy. Here is where they have their headquarters:

	Active	Senior
Seattle.....	1	
Portland.....	1	1
Honolulu.....	1	
San Francisco.....	14 $\frac{3}{4}$	2
Los Angeles.....	2	1
San Diego.....	1	1
Phoenix.....	$\frac{3}{4}$ 1	
Tucson.....	$\frac{1}{2}$ 1	

¹ Our Phoenix judge spends 3 months in San Francisco; our Tucson judge spends 6 months in San Francisco.

d. Massive paperwork

Normally, a judge who travels to a city to hear cases is there only long enough to hear the cases, confer about them, receive his assignment, and go home. This means that the circulation of opinions, comments and discussion about cases, and almost everything else about our business, goes on paper and through the mails, although we do make extensive use of the telephone. This method of doing business is not efficient, it takes time, and is far less satisfying than face to face discussion. Thus, with our judges so scattered, and with the number of us that there now is, the sheer volume of paper work, both in the Clerk's office and between the offices of the various judges, increases by geometric progression. This could be materially cut down if all of us maintained our offices in any one place. This, however, the law does not require, and although I would like it, I am not sure that it should be required. When a man has been practicing law or been a judge in a given community for many years, it is asking a great deal of him to pull up his roots and move himself and his wife, and his children if they are not grown up, to another city where they may not have any personal friends or ties. If it were required that every judge move to the headquarters of the court, it could well be that some highly qualified persons would decline appointments to the court. Fortunately for me, I need not personally face this problem.

2. CASELOAD

I joined the court in the fall of 1961. This is the record for the previous fiscal year, 1961:

Fiscal year 1961 appeals	Filed	Terminated	Pending
Total.....	443	470	372
Per judgeship (9).....	49	52	41

Fifty-two was also the national average number of terminations per judgeship that year for all of the Courts of Appeals. Our experience has been that about one-third of our cases are disposed of without decision on the merits--dismissed, transferred, settled, withdrawn, etc. So each of us had to write about

35 opinions per year. We had *no* backlog. We were hearing every appeal as soon as all briefs were in. It was a great time to join the court. That happy condition continued for two or three years. Then the avalanche began, and it has continued ever since.

Since 1961, our filings are up sixfold. Our dispositions are up well over fivefold. Our "backlog" is up more than sixfold (this refers to cases pending at year's end). Here is the record for fiscal 1974, with thirteen judgeships:¹

	Appeals filed	Terminated	Pending
Total.....	2,697	2,464	2,467
Per judgeship (13).....	207	190	190
In fiscal 1973, the figures were:			
Total.....	2,349	2,148	2,234
Per judgeship (13).....	181	165	173

For fiscal 1973, the last figure available to me, the national average of terminations per judgeship was 156, and of pending cases per judgeship was 108.

It took us longer than we should have taken to realize what was happening to us. But when we did, we began various efforts to stem the tide.

1. We asked for and finally got four more judges.
2. In common with the other circuits, we got two law clerks per judge.
3. We made massive use of visiting judges and senior judges.
4. More cases were heard by each active judge.
5. We made extensive use of per curia and brief orders.
6. We undertook screening of cases, beginning September 14, 1970.

By screening, we have increased our dispositions considerably. From September, 1970, through August, 1974, a total of 1324 cases were screened and considered by panels of the court. This was done without reducing the regular calendar workload; it was in addition to that load, which had also increased.

Since September, 1970, we have made a massive effort to get current on criminal cases. We have the largest load of criminal cases of any circuit. We now have an expediting law clerk. Each appeal, when filed, gets a fixed calendar date. The clerk "rides herd" on each case until it is ready to be heard. Each month each of us sits in one or more hearings at which seven or more criminal cases are heard on one day. Today, criminal cases are current.

In contrast, we have a horrendous problem with civil cases. On the average, these are the harder cases to decide. Litigants do not spend money on civil appeals unless they believe that the appeals are meritorious. As of September 24, 1974, there were 601 cases fully briefed but not calendared. Cases not entitled to preference are now between one and two years old. This does a grave injustice to the litigants involved.

We are also making massive use of visiting judges. Nearly every panel has one visiting judge. Most are district judges. Some are senior judges from other circuits. We also get a lot of help from our own senior judges. They like to take tough cases. All of this means that our per judgeship figures for dispositions look better than they are.

The more cases we have to decide, the more judges we have, and the more scattered they are, the harder it is to keep us functioning as one court—to keep our decisions fully consistent. By the same token, in banc hearings are very burdensome, and we try to avoid them. An in banc hearing means assembling 13 judges from all over the circuit. This is equivalent to four plus panels, and means the use of all that manpower to hear one or two cases instead of at least twelve cases. The paperwork in circulating an in banc opinion or opinions, getting comments, revising and recirculating, is enormous. Let me give you an example. Last December, two panels of the court, one sitting in Seattle, the other in Los Angeles, filed two opinions, almost simultaneously, deciding an important question of Federal law differently. The two panels attempted to agree between themselves on a proper solution, but were unable to do so. They then recommended that the court hear both cases in banc. The two cases were heard together by 12² judges in June. Following a lengthy conference, the cases were assigned to me. Opinions

¹ These figures include administrative review cases and original proceedings, just over 24% of all filings in fiscal 1974.

² It was stipulated that the 13th judge, who was unavoidably absent, could participate in the decision.

were circulated in July. Following circulation of memoranda and phone conferences with various judges, the opinions were revised. More memoranda and phone conferences ensued. In September, the cases were again discussed at a meeting of the full court. The opinions were filed on September 27. In one case there are a principal opinion, a concurring opinion, and three concurring and dissenting opinions. In the other, there are a principal opinion, concurring opinion, and a dissenting opinion. My files of drafts and memoranda are more than two inches thick! This year we have taken almost a dozen cases in banc.

The use of visiting judges also makes it more difficult to maintain institutional unity. They are not members of the court, they are with us only for short periods, and many do not feel the need for such unity as keenly as we do. If and when we can get current, we hope to reduce the use of visiting judges very drastically. The workloads of our district judges are constantly growing, so that it becomes more and more of a burden for them to assist us.

We have not been shy about asking for more help. We have asked for five more judges. We have obtained seven more law clerks and six more secretaries, and we are asking for more. We are constantly striving to increase our efficiency.

I am convinced, however, that none of these things will solve our problems. Without extra help and extra effort, we would never have been able to increase our dispositions from 52 per judgeship to 190 per judgeship. We might be able to increase them further with the help of more law clerks, secretaries, and other assistants. But we are now up to an average of about 110 opinions per judgeship per year.

My experience on this court leads me to conclude that a judge has about 189 regular working days per year in which to read briefs and records, examine authorities, and formulate and write opinions, as well as to consider the approximately 240 other opinions that will come to him from his colleagues who have sat with him. I reach that figure this way:

Days per year-----	365
Days vacation-----	—30
Total -----	335
Days (48 weekends)-----	—96
Total -----	239
Days for committees, administration, etc-----	—10
Total -----	229
Days hearing argument (10 mo. 4 days each)-----	—40
Total working days-----	189

In fact, most of us also work on those 96 weekend days. Thus, we have about 285 days, or less than three days per case! Yet we frequently have cases that require weeks, not days of work. If present trends continue, we will not really be judges at all.

Yet the bar and the people expect, and are entitled to expect, that their appeals will be decided by judges, not by law clerks. The more law clerks a judge has to work on the cases the judge has to decide, the more the judge is going to have to rely upon his law clerks in deciding the cases. He will do less and less of his own research and less and less of his own writing. He may even get to the point where the only persons in his office who even read the briefs are his law clerks. We are not there yet, but we are approaching that situation. This is not my idea of what a judge is appointed to do, and I do not believe that it is the lawyers' or the public's idea of what a judge is appointed to do. He is appointed to be a judge, and that means that it should be he, and not someone else, who does the deciding. He cannot do his job properly unless he has a reasonable amount of time within which to do it. Judging, among other things, is supposed to take thought, and a judge who is immersed in paper work, in bench memoranda from his law clerks, and in draft opinions from his law clerks, is not going to be able to take the time to do what he is supposed to be doing.

Thus, I think it imperative, rather than to increase the workload of judges by further administrative devices, to reduce it, and I do not think it proper to reduce it by creating a system under which somebody other than the judge is really doing the judging.

I have no pat formula for deciding how big a Circuit should be in terms of area, caseload, and number of Circuit Judges. But I am sure that the Ninth Circuit is *too large* in all of these categories. A smaller area would mean less travel, less scatteration of judges, less paper work, fewer administrative problems; a smaller caseload per judge would enable us to perform far better as judges. We make the law of the Circuit; frequently we make the law of the nation. We ought to have time to do those jobs properly. A smaller area and a smaller caseload will mean a smaller court. Nine judges, all located in or near one place and thus in daily contact with each other, and with a manageable caseload, are judges enough. Seven would be better. Such a court, I believe, could do a good job with a caseload of about 100 filings per judgeship per year. Much beyond that I do not think that we should have to do.

3. DIVIDING THE NINTH CIRCUIT

The following table shows the source, by state and district, of all appeals, including agency appeals and original proceedings, filed with us in fiscal 1974:

Alaska	32
Arizona	260
California	1,731
Northern	473
Eastern	108
Central	765
Southern	388
Hawaii	55
Idaho	38
Montana	45
Nevada	125
Oregon	147
Washington	218
Eastern	49
Western	169
Guam	43
Total	2,697

As will be at once apparent, the single most important figure is 1731 cases from California. If California alone became a separate circuit, with 9 judges, there would be 192 filings per judgeship—a figure far too large, in my opinion. To get the figure down to approximately 100 per judgeship, there would have to be 17 judges—again far too many, in my opinion. It seems to me inevitable, therefore, that California must be divided between two new circuits.

This is not something that I would like to see done, but it does seem to me essential that it be done.

The Commission would create two new Circuits with filings (fiscal 1974) as follows:

1. New Ninth:

California:	<i>Filings</i>
Northern	473
Eastern	108
Alaska	32
Washington	218
Oregon	147
Idaho	38
Montana	45
Hawaii	55
Guam	43
Total	1,159

2. New Twelfth:	
California:	<i>Filings</i>
Southern -----	388
Central -----	765
Arizona -----	260
Nevada -----	125
Total -----	1, 538

Nine judges in the new Ninth would face 129 filings per judge. Nine judges in the New Twelfth would face 171 filings per judge. The 129 is a reasonable number, in my opinion. The 171 is high, but much better than the 207 we faced in fiscal 1974, or than the 192 that a circuit of California alone would face. In the proposed new Twelfth, the judges would be in a reasonably compact circuit geographically, and could function much better as a unit than we now can.

If a new circuit composed of California plus one or more other states were created, the result would be even less helpful than to create a circuit covering only California, because such a circuit would inevitably have more filings than would a circuit covering only California. For example, in a letter to the Commission last December, Acting Attorney General Bork suggests that it would not be a mistake to create a circuit composed, for example, of California, Alaska, Hawaii and Guam, thus avoiding the problems which he thinks might arise from dividing the state of California between two circuits. He points out that in fiscal 1973, a total of 1642 appeals were filed in the proposed circuit, i.e., California, Alaska, Hawaii and Guam, which is fewer [by 67] than the number filed in the Second Circuit during that period. I add parenthetically that in fiscal 1974, the total filings for these states was 1861—more than 206 per judge for a nine-judge court.

The suggestion seems to me to miss the whole point of dividing a circuit. Next to the Fifth and Ninth, the Second Circuit is the most overloaded in the United States. It is also one of the most efficient, but I suspect that the time is coming when its workload will demand that it, too, be split. In fiscal 1973, the Second Circuit terminated only 1462 cases, carrying over 247 cases. This raised its pending cases from 681 to 928. There is no use going through the difficult process of dividing a circuit in order to achieve two circuits, each of which will have a workload that is manageable by a court of not more than nine judges, if one of the two is to have a caseload at the start which is or very soon will be too much for such a court. That is what the caseload of Mr. Bork's suggested circuit would be.

I am aware that many persons and organizations, including the State Bar of California and some leading local bar associations in California, are opposed to dividing the state between two circuits. Some of the objections are sentimental, and I share the sentiment, but not at the expense of the ability of our court to do its job properly.

The major objections are based on fears that the two new circuits will come down with conflicting decisions about California law, or about federal law as it affects California. These objections are considered, and I believe satisfactorily answered, in the Commission's Report. I add a few comments of my own.

The objections fall generally into two categories. One is a divergence of view between the two circuits when actions of state agencies or the validity of state laws may be challenged in two circuits, with the possibility of conflicting results.

With the greatest respect for the objectors, the fears expressed remind me of the ancient Scottish prayer which goes: "From ghoulies and ghosties and long-leggedy beasties and things that go bump in the night, Good Lord deliver us." Based upon my experience of thirteen years as a member of the Court of Appeals for the Ninth Circuit, I think that the problems that the objectors foresee are in the category of "things that go bump in the night." They are not real.

Most often mentioned is possible conflict if actions of state agencies or the validity of state laws are challenged in two circuits. This is not a new problem. Challenges to the actions of state agencies or to the validity of state laws now arise most often in three-judge district courts whose judgments are not appealable to the Court of Appeals but to the United States Supreme Court. There are four districts in California. Thus it has long been possible for similar actions to be filed in two different districts and to have three-judge courts in those districts come out with conflicting decisions. So far as I know, since 1961, when I became

a member of this court, *this has never happened*. There is no reason why it should happen if the state of California were divided between two circuits. Unless and until three-judge courts are abolished, the same possibility of conflict, *which has never occurred*, will continue to exist.

If, on the other hand, three-judge courts were abolished so that decisions would be made by a single district judge, and would be appealable to the appropriate court of appeals, I think the possibility of conflict is still imaginary rather than real. The natural tendency of one circuit or one district court to follow rather than to disagree with the decision of another circuit or district court should eliminate, and I think would eliminate, the possibility of conflict.

Moreover, if it is believed that these fears are justified, it should be possible to provide by law for the transfer of actions filed in different districts to a single district, thus eliminating the possibility of conflicts between districts and between circuits. The Multidistrict Litigation statute, 28 U.S.C. § 1407, provides an analogy.

The second category of cases that worries objectors is those that might produce conflict as to interpretations of state law between two circuits. Here, too, because there are four district courts sitting in California, this possibility has always existed. The difference of course is that with one circuit court, this court is in a position to reconcile those conflicts, while if there were two, there would be the possibility that the two circuit courts, like the district courts, would disagree. Here again, however, I have never known of a case in which two district courts in California have disagreed about what the law of California is, so that this court has had to reconcile the difference.

I can see no reason why there would be any more likelihood of such conflict when the district courts are in two circuits rather than in one. District court judges are independent minded people but they will not become more so merely because they are in different circuits. If there should be such a conflict between district courts, it seems to me almost inconceivable that the two circuits which deal with the laws of California would continue such a conflict. If one of them first decided the question, the other would almost surely follow its lead. This is partly because decisions by circuit courts on matters of state laws are not authoritative precedents on the question of what the law is. They are like Mr. Justice Roberts' famous excursion ticket which is good for this day and this trip only. I used to sit on the California District Court of Appeal and I well remember the reaction of that court when a decision of the Ninth Circuit was cited to us on a question of California law. Our reaction was, what does that federal court know about our law? In short, I think that the last thing that two circuits dealing with the law of California would want to do would be to create or preserve a conflict between them as to what the law of California is.

Moreover, if that should ever occur, it would always be open to the legislature or the courts of California to settle the question. In addition, I would guess that if California were divided between two circuits there would be little difficulty in persuading the California legislature to adopt the Florida procedure which permits a federal court having before it a question of Florida law about which it is in doubt to certify the question to the Florida Supreme Court for an authoritative pronouncement. This is only one of the many ways in which the problem envisaged, if it should arise, could be taken care of.

I urge that action to divide the Circuit, whether California is placed in two circuits or in one, not be delayed while the Commission and the Congress are studying other ways to revise the Federal Appellate System. We need help now, not in some distant future. If the Circuits are ultimately to be abolished, which seems to be most unlikely, it will not at that time matter whether there are then eleven or thirteen of them. If a national court of some sort is created, as many suggest, it will make no substantial difference to it whether there are eleven or thirteen circuits. Moreover, the national court, as presently proposed, is designed to relieve the burden of the Supreme Court. If it will substantially relieve the Courts of Appeals of their burdens, I have not been told how that is to occur. But if it does, it will be as welcome to thirteen circuits as it will be to eleven.

Finally, I comment upon an alternative to dividing the Circuit that has been suggested by some of my colleagues. That would be, instead of creating two circuits, to divide the Circuit into Northern and Southern divisions, under one chief judge. The "Divisions" would correspond to the new Ninth and Twelfth Circuits that the Commission recommends. Each would have nine judges. Headquarters for the Northern Division would be at San Francisco; headquarters for the Southern Division would be at Los Angeles. It has not been made clear

whether the Chief Judge would be a part of one of the Divisions, or would be separate from both, thus giving us 19 judges. The suggestion is thought to have several advantages. One is that it avoids the sticky problem of dividing California between Circuits. Another is possible greater flexibility in assigning judges to sit in one division or the other, as need arises. Another is that there would be more flexibility in assigning District Judges to other Districts as they are needed. It is thought that in the smaller districts, where per judge workload is less, judges can be available to help in the larger districts, where workloads are higher and where complex cases, involving lengthy trials, and sometimes disqualification of local judges, are most often found.

In spite of these claimed advantages, I strongly oppose the "Division" suggestion. If it were adopted, we would still have nearly all of the problems that we now have, and, as to some, we would have them "in spades." Trying to maintain the unity of a 13-judge court is bad enough; I shudder to think of trying to do it with 18 or 19 judges. The only way in which the "Division" suggestion could be made to work would be to have each "Division" function as if it were a separate court. Under such a system, we would soon have a Circuit divided in fact, but not in name—with most of our present problems plus a new one. I refer to maintaining unified law for the Circuit as a whole. Who would do it? The two "Divisions," 18 or 19 judges sitting in banc? If not, would a smaller group be selected to perform that function? If so, how? And how would the cases be selected for it to hear? By vote of the whole court? By vote of the "Division" concerned? By vote of the other "Division"? By the selected group that is to decide? Would not this in substance interpose between the "Divisions" and the Supreme Court another level of review? Would the Supreme Court require exhaustion of remedy at that level before it would entertain certiorari? If not, might not the Supreme Court find itself having to settle intra-"Division" conflicts? In short, I consider the suggestion of "Divisions" to be the suggestion of an administrative monstrosity, offering few advantages but preserving and to some extent making more severe nearly all of our present problems.

I realize, of course, that it is not desirable to have a large number of Circuit Courts. Too many can create an intolerable burden on the Supreme Court. But I doubt if serious consideration need be given to splitting any Circuits except the Ninth and Fifth. I omit the Second, because if anything were split off from that Circuit, it could readily be added to the First. No other Circuit appears to be—or needs to be—in real trouble. Thus I doubt that geographic reorganization would produce more than 13 or 14 Circuits. I think that the country—and the Supreme Court—could live very well with that number for a long time.

Judge DUNIWAY. There are some features of the ninth circuit which I think make our problems different from those of any other circuit. I think it is fair to say that our problem is complicated by our geography: we are much larger than any other circuit. We therefore feel that we owe it to the litigants to go to them—at least in part—rather than making them come to use in San Francisco. So we have monthly sittings in Los Angeles 11 months of the year. I believe this past year we had 12. We have monthly sittings in San Francisco 12 months of the year. We go to Portland and Seattle 3 months of the year. We send a panel to Alaska and one to Hawaii once a year. We have our judges scattered. One lives in Seattle, one in Portland, one in Honolulu, and there are 4¾ of us in San Francisco. By that I mean one of our judges spends half the year in San Francisco and half in Tucson and another judge spends a quarter of the year in San Francisco and three-quarters of the year in Phoenix. We have another judge in San Diego and two in Los Angeles. We also try to avoid having "local" panels, thus the local judges are expected to sit just as much in the other cities as they do in their own. We don't want to have the court divided up into separate panels with the consequent possibility of conflicting decisions that sometimes arise from that. We don't think that the lawyers ought to be able to pick their panel. So all of us travel.

Now, in my experience in 13 years on the court, this has caused a considerable degree of inefficiency in the disposition of our business. When I go to another city to sit I am just not as effective in doing the work—other than in listening to oral arguments—as I am at home, where I have my own library, files, law clerks, secretary, and so on. I think every one of us runs into that.

In addition when we sit en banc, and we have done so on about 12 cases this year, this means that we have to assemble the 13 of us from every part of the circuit to hear one or two cases. That is the equivalent of more than four panels of the court. We then have to confer about the case, and an opinion has to be drafted and circulated. It takes an enormous amount of time.

I have given an example of what happens in one of those cases in the prepared statement which I filed here this morning.

I think the distance, the amount of traveling that we have to do, and the fact that we are so far apart that a great deal of our business has to be done by mail or on the telephone has had a serious effect on the efficiency of the court. I can see it myself as a result of having been on the court since 1961. We then had nine judges on the court, seven of whom had their headquarters in San Francisco, one in Los Angeles, and one in Fresno, and we saw those two judges every month. The seven of us who were there frequently had lunch together and discussed our cases. It was much easier to maintain the court as a single court applying the same principles panel by panel than it is now when we are scattered all over the place. This is one of the things that has, I think, made it difficult for us to manage the enormous increase in caseload that we have had.

You mentioned some figures, Mr. Chairman, about this past year and I have some figures in this prepared statement. I just want to contrast them with the figures we had 13 years ago when I came on the court. In fiscal year 1961, 443 appeals were filed in our court, and 470 were terminated. That is 49 filings and 52 terminations per judgeship, contrasted with the figures that you read into the record a few moments ago of 2,697 filings and 2,464 terminations or, for 13 judgeships, 207 filings and 190 terminations per judge. Our dispositions per judgeship have been going up every year.

You mentioned the fact we have been using a large number of district judges and senior judges to assist us. We have, but we are now hearing a larger number of cases per active circuit judge actually participating than the approximately three cases that I think you mentioned. Last month, for example, I sat for 2 days during which I heard eight criminal cases each day, and 2 days during which we heard six civil cases. This month I have a similar situation, and most of us are doing that. We have gradually gotten current in our criminal cases in two ways. One of them is by riding herd on the appeals when they are filed—by seeing that they get to us promptly. We have a clerk who does nothing but ride herd on counsel to get their papers in. Then we regularly calendar them on these longer calendars. In a substantial number of them we hear no arguments. Most of them we dispose of with a very brief opinion—just a few lines up to one page—unless we think the case is one that has value as a precedent.

Civil cases have caused us a great deal more difficulty. As you know, in the criminal field, particularly with the Criminal Justice Act, the convicted defendant has little to lose by filing an appeal. The consequence of that is that there are a good many appeals filed that don't have much merit. In the civil litigation, on the other hand, parties seldom will take an appeal which is going to cost them substantial money unless they think they have a chance to win the case. I have no doubt there are a few civil cases taken purely for delay, but seldom is a civil case disposed of as readily as a criminal case on the average. Some civil cases are very difficult and some are very easy, but, on the average, the civil cases take much more time. The briefs tend to be longer and much more complex, and the amount of work is greater. Consequently, we don't calendar as many civil cases as criminal cases. Keeping current on criminal cases reduces the time we have for our civil cases. But again, because of the distance we have to travel, I suspect we are somewhat less efficient than I know we were when the whole court, or practically the whole court, was all together 13 years ago and for 2 or 3 years after that.

I strongly support the recommendations of the Commission for the division of the circuit. I don't think it will solve all our problems, but I think it will enable two courts adequately manned to do a far more efficient job than we are now doing. I know that I have the very strong feeling—based on my own experience—that, because of the pressure and volume of business, the quality of the work that I am doing and the amount of consideration that the litigants get from me in the cases that I am required to hear and help to decide, is not what it used to be. In order to dispose of the number of cases that I have to dispose of, I am now writing better than 100 opinions and memorandums deciding cases each year, and that means that I have better than 200 that I have to take a look at from my colleagues before I decide whether to concur in them or not. I know perfectly well that, under those circumstances, those cases do not get the kind of attention that they used to get when I had more time. Most of my research has to be done by someone other than myself. I review that, and I read the briefs in every case, but how much longer I will be able to do so I don't know. The burden of the caseload is very heavy.

Whether the circuit is split or not, I am very sure of one thing, and that is that we need more judge power. I am also confident, however, that if that judge power comes in the form of two adequately staffed courts, then between them they would do a better job than one court with more judges. I think that is true simply because, among other things, the distance, the travel, and the "scatteration" of the judges around the circuit makes it so difficult to maintain what I call "institutional unity" within the circuit. The more panels we have, and the more separated they are, the more danger there is of our going off in different directions. That has happened and that is why we are having some of our en banc cases.

Now, the Commission's recommendation includes the recommendation for the division of the State of California between the two new circuits. As a Californian, for sentimental reasons, I would expect myself to oppose it, but because I have lived with this problem now for about 13 years, I am convinced that if the circuit is to be divided it is important that the State of California be divided between the two new

circuits. This would be the first time this has ever been done, and naturally the bar and some of the judges object—as one of our San Francisco supervisors put it, “the most unheard of thing I have ever heard of”—but that is not a very good reason to object, and I think many of the objections are of that kind.

The State of California, in which I have lived, practiced, and been on the bench now for about 40 years, is a very interesting State, as you know. There is a certain natural geographical difference between the two portions of the State. The State has lived with this for a long time. The Governor has an office in Sacramento but he also has one in San Francisco and one in Los Angeles. The attorney general has three offices. The State Bar of California has always divided its major committees into two sections, north and south. I was chairman, for example, of the State Bar Committee on the Administration of Justice, and the northern section used to meet very frequently, especially during the sessions of the legislature because the bar had an active legislative program. There was a corresponding section in the south. Once in awhile the two committees would get together and hash out differences, but the rest of the time we functioned separately.

On the other hand, there are a great many unifying factors in the State.

But I am convinced that the problems I have heard raised about the division of the state are pretty much what lawyers call a “parade of horrors.” They are mostly imaginary and, to the extent they exist, they are, I think, readily solved.

Preliminary let me say this: If the State of California alone were made into a single circuit, on the basis of the filings in 1974 that circuit would have had 1,731 filings last year. That’s just the State of California. With a court of nine judges that is almost 200 filings per judge. If you add any other State to it, you quickly get above 200 filings per judge, and you are right back. I think, to some of the major problems you are going to have to solve if the judges are going to be able to function as I believe judges ought to function. They must have time to study their cases, time to think about them, and time to write decent opinions. You are either going to have to have more than nine judges immediately, or soon thereafter have a circuit composed solely of the State of California. If you add any other State to it you are getting back to a point where the exercise of dividing a circuit for the purpose of increasing the efficiency will be essential, and the institutional unity of each of the new courts would be pretty well gone as far as any “California circuit” is concerned. This is why I think that this problem is unique to the ninth circuit, and I think that something that a lot of us don’t feel very pleased about from a sentimental point of view has to be done.

Now, among the principal objections raised there are two which are related directly to California. One is the contention that there would be a danger that there could be an attack on the validity of a State law or statewide agency decision in the Federal courts in each of the two new circuits with conflicting decisions from the circuits as to what the authorities in California can do or as to whether a California law is valid. This is not a new possibility. We now have four district courts in California, and we have had four for some time. It used to be just two, but even then there were two. Most of these questions involving

attacks on the constitutionality of a State law or statewide action by administrative bodies of the State come up in three-judge district courts in which one circuit judge sits and from which the appeal is not to the court of appeals but directly to the Supreme Court. So all the time there is the possibility of conflict, just the kind of possibility I am talking about, between two three-judge district courts in the State of California. It may be that somebody has found one someplace, but in the 13 years I have been a Federal judge in California I have never heard of this happening. I think this is the kind of thing people like to think of—when they don't want something done—as a good reason for not doing it, but the fact is it hasn't happened.

If three-judge courts are abolished, there will then be a possibility that, on appeals from these two district courts within the two circuits, the two circuit courts might disagree. I think there are ways of solving that. One, as an example, is the multiple litigation statute under which, if there were cases attacking the validity of a statewide agency, one in the north and one in the south, one could be transferred to another court so you could have them all heard in one district court with one circuit giving the result.

There are other things that could take care of the problem if it should ever arise.

The other principal objection relating directly to California is the possibility of conflicting decisions between the two circuits as to what the law of California is. That kind of question can come up in at least two different ways. One is in a diversity action based upon the difference of citizenship where the Federal court is bound to apply the State law. The other could be in a Federal suit—there are many—where the question will turn in part on the State law, as for example, the validity of a lien in a bankruptcy, certain tax matters where a Federal tax law applies but where the State law governs the property transfer, or things of that kind. There are many cases of this kind. Where you have a conflict of laws case, you may find that the second circuit in New York City is deciding what the law of California is.

This again is a problem which I think is more imaginary than real so far as conflicts within the State are concerned. There are several reasons why I believe this is so. First of all, we have had for some years now four districts in California, each of which is obliged to apply the law of California. If there has been an instance in the last 13 years in which two district courts in California have disagreed about what the law of California is, it has never come to my attention and it has never been necessary for our court to straighten out that kind of conflict. Theoretically it could happen. If there were two circuits there should be some way of straightening out that conflict.

The State of Florida has a statute under which, if the Federal court has a doubt, if you will, about a State law properly before the court, it can certify that question to the supreme court in Florida and have it decided. I think something similar could be done in California if it were felt necessary to do so. In addition, of course, a Federal court decision as to what the law of California is is not authoritative in the courts of California. When I sat on the California District Court of Appeals in San Francisco and a decision of the court on which I now sit was cited as to what the law of California

was, our reaction was, "what does that Federal court know about the law of California?" If we agreed with it, we followed it; but if we did not, we just disregarded it. At the most it was persuasive authority, not controlling authority, on what the law of California was.

Now, the other objections that have been raised are of a different character, and these, I think, are purely delaying tactics. One that has been heard is that a decision on whether to split the circuit should be deferred while the Commission considers other ways of improving the workload or reorganizing the Federal appellate courts. If there is any proposal of that kind which both has the promise of a substantial effect in solving the problems of the ninth circuit and has been so far developed as to have any kind of general support, I don't know about it. I have heard about the proposed national court and, each time I read somebody's statement about what the national court is to be, it is different from the last one. The last concept is so nebulous I suppose it will be a long time before anything of that kind would be adopted. Moreover, from what I understand, the people who are talking about the national court, it seems apparent, are seeking to relieve the workload of the Supreme Court of the United States; if there is any way in which that national court is going to assist the circuits with their problems, I have not been told what it is. Now, it may be that, eventually, legislation will be adopted which will reduce the jurisdiction of the Federal courts. That, of course, should have the effect of reducing our workload, but I think that that is not very likely. Indeed, my experience over the past 13 years is that, by and large, the legislative actions of Congress have increased rather than diminished the jurisdiction of the Federal courts. As you know, it was suggested to Congress that we ought to have a weighing of the increased business that will come to the courts every time there is a new bill. I do think it is true that, by and large, the jurisdiction of the Federal courts has been increased, not decreased.

I don't know of any proposal, in short, for improving or reforming the Federal appellate system which offers any immediate relief from what the judges now face. Therefore, I think, there is no reason to delay action on a division of the circuit in hopes that something like that will turn up. If there were 13 circuits instead of the 11 we have now, any reform of that sort would be just as helpful to all 13 as it would be to all 11. If it were decided to abolish the circuits and establish something on the order of the model of the tax court, I don't see how it would be any more difficult to abolish 13 than 11. In the meantime, I think, realignment would enable use to do a much better job, and it ought not be delayed in hopes that some of these other things, or one of them, may materialize.

There has been a suggestion that we might operate in two divisions, a southern and a northern division under a single chief judge, with the same number of judges we would have had if we had two new circuits. My belief about that is that one of two things will happen: Either we will continue to have all the internal administrative problems from which we now suffer or we will very rapidly find out that what we really have is two circuit courts sitting separately. Then we would have the additional problem of trying to maintain the notion that the precedents of each of them were precedents for the other, and we would be having en banc hearings with 18 or 19 judges, which, although possible, is not something I contemplate with pleasure.

That about covers my general views on the matter, Mr. Chairman. I will be glad to answer questions, if I can.

Senator BURDICK. Judge, that was a very excellent statement. You presented your case very well.

We have had testimony before the committee indicating that the ideal number of judges for a circuit was 9, that we might possibly stretch it to 11, but that 9 would be an ideal number, giving a more efficient operation. You mentioned the en banc problem and others. Do you agree that you can get the greatest efficiency out of a lower number?

Judge DUNIWAY. I thoroughly believe, Mr. Chairman, you get more efficiency out of a lower number, but I am not sure I would say nine is the ideal. I had the happy experience of sitting for 2 years on a three-judge court in California which was highly efficient, and I think more efficient than the nine-judge court that I moved to down the street when I became a Federal judge. So that the smaller the better for efficiency.

On the other hand, it seems to me pretty apparent, that, while I think the Supreme Court could live just about as well with 13 circuit courts as 11, considering certiorari and possible conflicts between them, if you would make nothing but three-judge circuits in the United States, you would have a system where the Supreme Court would be overwhelmed with petitions for certiorari from those courts.

I am convinced that the efficiency of the court starts to go down somewhere between seven and nine judges and it goes down very fast as the number increases.

Senator BURDICK. The old theory about diminishing return sets in?

Judge DUNIWAY. Yes.

You talk about the economics of scale, you know; well, you go up the scale a little bit, but then it goes down very fast as the number of judges increases.

Senator BURDICK. That light up there signals a vote that is coming up on the floor, but we have a period of grace. When five bells ring I will have to leave, but if you don't mind staff will ask you questions in my absence and I will be right back.

Judge DUNIWAY. Surely; be glad to.

Senator BURDICK. Do you think you have adopted all the timesaving procedures that can be adopted?

Judge DUNIWAY. I don't honestly think I can say yes to that question, partly because I am not sure I know what all the possible judge timesaving procedures are. We don't decide cases from the bench like the second circuit. We do, very often, decide them within a day afterwards by a very brief memorandum. There are some other devices of that kind that we might use.

Do you have any specific ones in mind?

Senator BURDICK. Yes, I do, Judge. Last week, we heard 3 days of testimony from witnesses from the fifth circuit, and there they practice the so-called screening process. They screen these cases, given the right of one judge on the panel to ask for an oral argument, and, if the case is so clear and well defined that it isn't necessary to have an oral argument, they don't grant it.

Judge DUNIWAY. We have been doing this for quite some time but not in exactly the same way.

Let me tell you how it is going with us. In 1970 we instituted screening, but we had the cases examined by law clerks who came up with a recommendation as to whether the case should or should not have oral argument. If the recommendation was no, then the briefs with their memoranda went to a weekly screening panel which had those cases in addition to whatever cases the members were hearing during the month. In other words, this was extra caseload for them. Each judge examined the cases. They didn't have to get together to do it. Unless one of them asked to have oral argument there was no oral argument. The senior judge on the panel assigned the cases by mail to other members and they would be disposed of without getting the court together except by mail, unless, of course, it happened that the three members rotating on those panels were in the same place. We have disposed of about 1,500 cases since that time.

Now, we have changed our procedure in two ways thereafter. One factor was that we were very anxious to get current on the criminal cases. We felt an obligation that that had to be done. We dropped the screening of criminal cases. We are now doing it on civil cases alone. We substituted this process of calendaring every criminal case as soon as it is ready and hearing as many as eight or nine a day. There the judges do screening. For instance, I have been looking at the briefs for next week's criminal calendar which I will sit on, and I expect within a day or two to be on the telephone to the other judges as to which ones we can decide without oral argument. That is really an informal method of screening, there. Now, on the civil cases, instead of having a separate screening panel, each month our staff attorneys, who examine these cases to determine whether they are heavy or light cases, will recommend that a certain number be considered as what we call light cases. Those cases will not normally receive an oral argument. They are simply added to the court calendar that month. So, instead of my hearing three cases, I will have three regular civil cases requiring oral argument plus three more of the light cases. That is, in effect, screening. We have been doing that, but not in quite the same way that the fifth circuit has done it.

Senator BURDICK. In 2 years we will be celebrating the Nation's 200th anniversary. We should have a pretty solid background of cases by then at this rate.

Judge DUNIWAY. It always amazes me when somebody can find something that precisely fits. We write a memorandum in those cases which is simply an informal way of telling counsel why we did what we did. They have no precedential value and they can't be cited. I think about 50 percent of our cases are decided that way. We may get it higher.

Senator BURDICK. If this circuit were split, you would certainly reduce travel time. You mentioned the problems of bringing judges together. I see more problems with more judges.

Judge DUNIWAY. That is right.

Senator BURDICK. If we split circuits, we could reduce that considerably, I presume. Apparently the opposition comes from those who would like to be a unit consisting of one State. Isn't the Chamber of Commerce thinking they might be a little crowded with two circuits in their State?

Judge DUNIWAY. I would like to persuade them on that.

Incidentally, the proposed new 13th circuit would be a much more compact circuit than the other which would have the rest of the States in the circuit in it. It would also have a somewhat heavier caseload. I would think, probably, we should have about the same number of judges, nine, for each of those circuits to start with. The southern circuit, which would be more compact, requiring less travel, would probably have most of its judges right in Los Angeles and could operate somewhat more efficiently. The northern circuit, which would go all the way to Alaska and Montana, unless some of the States were transferred to a different circuit, and I don't think either the eighth or tenth would like those States added to them.

Senator BURDICK. I can't help but think that the savings, just in travel time and in en banc matters, would be tremendous.

Judge DUNIWAY. I believe that very firmly.

Mr. WESTPHAL. Judge, I don't find anywhere in the rules of the ninth circuit any rule which covers the amount of time prescribed for oral argument, either by types of cases or all cases. How is the time for oral argument allocated?

Judge DUNIWAY. There is a provision in the Federal Rules of Appellate Procedure and the normal time is a half hour to each side. Each time a calendar is heard the presiding judge informs counsel in all cases that the members of the court, all of them, have read the briefs and are familiar with the issues and that they can take that into account in framing their argument. The next question is, "How much of your allotted time do you think you have to use?" This cuts it down very substantially.

Mr. WESTPHAL. You do this every morning at 9:30.

Judge DUNIWAY. Every session when we come in to hear the calendar.

Mr. WESTPHAL. So you call the calendar and you allocate time then?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. As the Chairman indicated in his opening statement, the subcommittee staff has done a study of the calendars of each of the 11 circuits for fiscal year 1973. In the ninth circuit, in 1973, a three-judge panel of the court, sitting for the purpose of hearing oral argument heard, on the average, 3.3 cases per day. In the seventh circuit, for example, they set six cases per day. A number of circuits sat five cases a day, and I think a number of them sat four a day, but they sat some 10-plus weeks per judge on the average as compared, for example, 9 full weeks and 3 days in the ninth circuit. In 1973 the 12 active judges on your court averaged 48 days per judge of sitting on three-judge panels. This is exclusive of any en banc matters and exclusive of anything that was peculiarly a motion calendar.

Now, I take it that as you call the calendar you find a number of cases where parties do not use up the full hour.

Judge DUNIWAY. Particularly in criminal cases.

Mr. WESTPHAL. And a number of them probably say well, instead of 30 minutes for each side, Judge, we can get by with 15 minutes per side?

Judge DUNIWAY. That is right, sometimes 5 minutes, sometimes 15, sometimes 20, and so on.

Mr. WESTPHAL. Of course there is nothing in the Federal Rules of Appellate Procedure which would prevent the court from, instead of following the normal procedure of 30 minutes per side in every case, by rule or by decision in each individual case, just simply saying, "the court has allocated 20 minutes per side" in this case, or 15 minutes per side, or if you want to get down to what they do in the second circuit, 10 minutes per side?

Judge DUNIWAY. Yes; that could be done.

Mr. WESTPHAL. Of course, if you do not do that, and if you have three cases set and each case takes their full half hour the court has sat from 9:30 to 12:30 in order to hear argument in just three cases.

Judge DUNIWAY. Right.

Mr. WESTPHAL. You have indicated that on some days you will sit for as many as six or seven or, occasionally, more than eight cases per day if they are believed to be of lesser significance—

Judge DUNIWAY. It is not quite like that, Mr. Westphal. We have to divide our current practice between criminal and civil cases. I sit 10 months a year, during 1 week in each month. In that week I will normally hear two calendars of criminal cases, with an average number of 8 cases on each one. Now, among those there will be a certain number in which we will advise counsel in advance that we aren't going to hear oral argument. There will be others where we can get them to materially reduce the time that they will use. During the other two days I will be sitting on three civil cases, each of which will normally take an hour. With our current screening practice there will be anywhere from two to four additional cases either with no oral argument or, if we chose to, we can say half the normal amount or any figure we chose. I say up to four. This new system of dropping these cases in on the calendar rather than having a separate screening panel has only been in effect about 8 weeks. We haven't quite gotten up to the four, but it has to be a maximum of four which would make eight cases on the civil calendar as well.

Mr. WESTPHAL. As I understand it, for the past 8 weeks your printed daily calendars have included both cases set for oral argument and cases in which no oral argument will be accorded.

Judge DUNIWAY. Not in criminal cases. They are all just put on the calendar. The judges who are on the calendar get the briefs and the records about 3 weeks in advance. They look them over and decide which ones we will not have oral argument in.

Mr. WESTPHAL. That is criminal.

Judge DUNIWAY. That is criminal.

On the civil calendar there will be three regular civil cases set on the hearing day and then the screening staff of law clerks will have examined the cases and come up with some of what we call "light" cases, which will require no oral argument or brief argument, and those are added to that calendar, up to four. In those cases counsel are notified when they go on the calendar and, unless the court has asked for it, there will not be oral argument.

Mr. WESTPHAL. This practice with respect to both civil cases and criminal cases was not employed by the court in calendar year 1973; is that true?

Judge DUNIWAY. In 1973 we were using the same practice, as I recall, beginning in September of 1973. We were using the same practice we now use on criminal cases, but in the latter part of 1973, and up until about May or June of this year, we had our screening panels for the cases that the staff lawyers thought were "light" cases in civil cases. Now we calendar them as we do the others, but usually without oral argument.

Mr. WESTPHAL. Just so I understand it, in 1973, with respect to civil cases, if the screening panel had determined that the civil case did not deserve oral argument for whatever reason——

Judge DUNIWAY. It did not go on that calendar at all.

Mr. WESTPHAL. It did not go on the printed daily calendar of that particular panel.

Judge DUNIWAY. That is right. There was a separate calendar for a weekly screening panel and it could have up to 10 cases. It averaged about six.

Mr. WESTPAHL. Now, in 1973, with respect to the calendaring of criminal cases, you would calendar up to eight and——

Judge DUNIWAY. Beginning in September of 1973.

Mr. WESTPAHL. And we noticed on one or two occasions there would be possibly up to 10 cases calendared. I suppose they had a combination or something.

Judge DUNIWAY. Usually that would be a case in which there was one trial and two appellants or three, something like that.

Mr. WESTPHAL. But in any event, where you had up to eight criminal cases calendared, the panel to which those eight cases were referred would determine which of the eight cases would be accorded oral argument and which would not be?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. And counsel would be notified in advance?

Judge DUNIWAY. Counsel would be notified if there was to be no oral argument. When they went on the calendar, counsel got notice that their cases were set for such and such a day. They got notice before the hearing if there was to be no oral argument.

Mr. WESTPAHL. Now, in reviewing the calendars for fiscal year 1973, we noted that there were a number of days in which only two cases or one case were set on the calendar. Were all of these situations situations where the magnitude of the issues involved in that case were such that more than a half an hour per side was being allotted?

Judge DUNIWAY. I would say generally not, Mr. Westphal. They could fall in two categories. We get a certain number of what we call expedited appeals, for example, where a witness is held in contempt for refusing to answer to a grand jury. The appeal has to be decided within 30 days. A panel will be drawn to hear it, and it will be set down one day to be heard without regard to the calendar. We get a certain number of others where it seems very important that the case be decided immediately, and they will be set down that way.

I would guess in the other cases where it turns out there are only one or two on the calendar that a couple got settled and it was too late to put another one on.

Mr. WESTPHAL. I am just looking, for example, at April 30, 1973. Several panels sat in Portland. On Monday there were three cases calendared for one panel, on Tuesday one case, on Wednesday one case, and on Thursday one case. So that——

Judge DUNIWAY. I can tell you what that was. That was something very special. That was the opening of the new Pioneer Courthouse in Portland. We had a whole bunch of our judges up there, and part of the time was taken on the celebration. As I recall, just to give everybody a chance to sit once in the Pioneer Courthouse, they scattered the small calendar around. I think that was the one. As I recall, the opening of that courthouse was in the spring of that year.

Mr. WESTPAHL. Well, then, during the week of February 12, and I am not sure where the panel sat, on Monday there were five cases calendared, on Tuesday one, on Wednesday one, on Thursday three, and on Friday five.

Judge DUNIWAY. I couldn't tell you what that was.

Mr. WESTPAHL. Absent ceremonial occasions, like the Pioneer Courthouse in Portland, and assuming that an advance allocation of time was made according to the complexity of the issues presented in the case, don't you think it is conceivable that the average number of cases calendared per day could be increased from 3.3 up to at least four cases per day?

Judge DUNIWAY. We think we will get it higher than that with the current program we have of adding cases to the civil calendar. Our objective would be to get that up to eight, like the criminal calendar.

Mr. WESTPAHL. This would include both orally argued and non-argued cases submitted on briefs?

Judge DUNIWAY. On that day.

Mr. WESTPAHL. Is this part of the program that your senior law clerk will be working on?

Judge DUNIWAY. That is exactly the program. We hope to get it operating in such a way that there will be a bench memorandum even in the complex cases.

Mr. WESTPAHL. Now, along this same line, I recall in your prepared statement that you said that, when, for example, a panel sits in Portland and the three members of that panel are not from San Francisco, say, a judge from Los Angeles—

Judge DUNIWAY. Well, say one from Honolulu, to give it a nice variety.

Mr. WESTPAHL. You intimated basically that what that accomplishes is that the three judges hear the argument, you draw the assignments and go back to your homes and work on the opinions which have to be circulated by mail?

Judge DUNIWAY. That is right.

Mr. WESTPAHL. On such occasions, assuming you heard the 3.3 cases on Monday, when you are through by 12:30 or 1 o'clock, do those three judges confer on those three cases?

Judge DUNIWAY. Certainly. Every day we confer on the cases we heard that day.

Mr. WESTPAHL. And at that conference, if possible, a tentative disposition is agreed upon and assignment of the opinion-writing chore is made?

Judge DUNIWAY. That is exactly what we do.

Mr. WESTPAHL. Of course, I assume it is the practice in the ninth circuit for most of the judges to either read the briefs or at least the law clerks' bench memorandum so they have a familiarity with the issues?

Judge DUNIWAY. I would say it is the practice without exception for the judges to read the briefs before they hear the cases. We tell counsel we have read them before we hear the argument.

Mr. WESTPHAL. And that shortens argument considerably? For example, appellant's counsel doesn't have to devote so much of his time explaining the facts?

Judge DUNIWAY. That is right. If he starts with a set speech he gets interrupted very quickly.

Mr. WESTPHAL. So that really the point you make in your statement is that, because of this scatteration syndrome in the ninth circuit, the real inefficiency comes from the fact that in polishing that tentative draft of the opinion, in circulating it, it all has to be done by mail and can't be done by the judges walking down the hall to a different chamber and sitting down and talking out a point face to face?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. I think you said that, when you come on the bench in 1961, there were only nine judges, and that seven of them resided and had their principal chambers in San Francisco and there was therefore greater efficiency?

Judge DUNIWAY. That is right. My frequent practice in those days was simply to walk down the hall to one of my colleagues on the panel, or to get both of them together, and talk it over. That was a very helpful thing to be able to do. We do this by telephone, conference call, now, but for some reason, and I am not able to explain this, you don't really get down to the nitty-gritty of a question in a telephone conference the way you can when you have three people face to face. I have no way of telling you why that is so, but I know it is so from experience.

Mr. WESTPHAL. Judge, in your present internal procedures in the ninth circuit, as the record indicates, there has been an extensive use of active district court judges and senior district court judges from within the ninth circuit, employing them as a third member of a panel or division of the court constituted for the purpose of hearing argument. Apart from the fact that the district court judges themselves seem to have enough work to do if they stayed home, what problems, if any, does that present in your opinion insofar as the operation of the appellate court is concerned?

Judge DUNIWAY. It presents two problems. One of them you put your finger on. These judges, most of them, have a workload of their own. They don't get credit for the time they put in with us. I haven't any statistics to back up this statement, but I am sure this is so. By and large, where the district judge sitting with us gets a difficult case in which to write the opinion, it is longer before we get that draft than it is from one of us, because his first duty is to the litigation in his district.

The other problem it creates is this: The district judges, I think, are, on the whole, I guess, because they aren't regular members of the court, less conscious of the importance that we attach to trying to see to it that the decisions of all our panels are consistent with each other so that we have just one law in the circuit. We tend, therefore, to have district judges—well, they are likely to come up with an opinion which the circuit judges think has to be modified, or it is not

going to fit in with certain other of our decisions. They either stand by their position, in which case we may have them dissenting, or one of us dissenting, or there is the time involved in persuading them to change their minds. I think that it tends to increase the problem of maintaining what I call our institutional unity.

Mr. WESTPHAL. Another term sometimes referred to is "collegiality."

Judge DUNIWAY. Right.

Mr. WESTPHAL. We hear a lot of talk about how great collegiality is if you don't go beyond the number 9, but what you are pointing out is that, as you employ some 50 or 60 different judges in a mix with your regular 13, you also destroy collegiality.

Judge DUNIWAY. That is a very serious effect. Most of the judges that sit with us don't sit for a full week. They sit for one or two calendar days and then somebody else comes in.

Mr. WESTPHAL. You mentioned that you first adopted the screening practice in September of 1970 and that you disposed of some 1,500 cases by that method. Now, that is 1,500 cases over a period of approximately 4 years?

Judge DUNIWAY. That is right, those are in addition to the cases on the regular calendar.

Mr. WESTPHAL. Yes; I understand.

Now, Judge, how long were you on the State bench?

Judge DUNIWAY. Two years.

Mr. WESTPHAL. You have been on the ninth circuit bench for 13 years?

Judge DUNIWAY. Thirteen years last month.

Mr. WESTPHAL. Before that you were practicing law in the city of San Francisco?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. You told us that you strongly or heartily endorse the recommendation made by the Commission to the effect that the ninth circuit should not only be divided, but that, in that division, the four judicial districts of the Federal district court should be allocated two to each division of the ninth circuit. I take it the main reason you support that is that, if the State of California alone were to constitute a single circuit, it would have a caseload to start out with of some 1,731 or 1,737 filings, and, if the number of judges were kept to nine, those judges would be starting out with a caseload of almost 200 filings per judge. I assume they would get their portion of the so-called backlog or pending cases and that they would have a caseload that would be very difficult for just nine judges to handle, just on the incoming caseload, let alone with the backlog?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. Certainly if you were to keep the State of California intact with the 1,737 filings and then add to it, for example, Arizona and Nevada—Arizona having over 200 filings and Nevada having some 70 filings as I recall—that caseload, for a circuit composed of California, Arizona and Nevada, would be well over 2,000 cases.

Judge DUNIWAY. That is right.

Mr. WESTPHAL. That, for a bench of nine judges, would be even a higher caseload per judge than the present—

Judge DUNIWAY. They would be worse off than we are now.

Mr. WESTPHAL. So that, really, if any proposal other than splitting the State of California into two circuits is considered, one must also consider just how closely we can stick to the magic number "nine." We would have to give consideration to increasing the number of judges to possibly 11 or 12 to start with, simply to give the judges a more manageable caseload to work with. Is that correct?

Judge DUNIWAY. Yes, that is correct. As a matter of fact, I would add this: even if it were decided not to split the State of California, I would still divide the circuit. I would add not more than one State to California if it were felt necessary to preserve the interstate character of the circuit—probably Arizona—and I would add enough judges to handle the load. I would put the headquarters of the court in the most central place in that area, and, if I could, I would make every judge on the court have his office there and provide him with as much help otherwise as possible. I think they could function more efficiently than we do now. But, if they did that in that other circuit they would have to have a higher caseload per judge ratio because there would still be the problem of geography. If you divided the State of California, the northern circuit—the New Ninth as the Commission calls it—probably should have a smaller number of filings per judge than the New Twelfth, because, again, it would retain, still, a very large and scattered geography, whereas the New Twelfth would be more concentrated, and, I think, could function somewhat more efficiently, so that the judges in that circuit, I think, could handle a somewhat higher per-judge caseload.

Mr. WESTPHAL. Judge, in your statement you seem to indicate that a filing figure of 100 per judge, in the best of all worlds, is the optimum that you would like to see.

Judge DUNIWAY. I would be very happy to see that. I wouldn't say it was the optimum. The optimum was when I came on the court; we then had 52 per judge.

Mr. WESTPHAL. But like the nickel cigar and the nickel beer, those days are gone forever.

Judge DUNIWAY. That is right.

Mr. WESTPHAL. But, when you are talking about 100 per judge, what you are saying is that that would really be 300, assuming the same panel sat and heard all cases. That panel would be hearing 300 cases, one judge would have to write 100 opinions, and participate in two hundred others; isn't that what we are talking about?

Judge DUNIWAY. Not quite, Mr. Westphal, because as I pointed out in the statement, the filings figure is deceptive. There is an attrition of about 35 percent, so that means each judge would have to write about 65 opinions and pass on 130 others to his colleagues. That is less than I am trying to do now.

Mr. WESTPHAL. Now, then, in your statement you point out that, under the Commission's proposal, the northern circuit, or the New Ninth, would have a caseload of 1,159 filings, which for nine judges would give a caseload of 129 per judge. You seem to imply that 129 per judge is acceptable and is a manageable figure, especially in the light of an attrition rate of approximately 35 percent.

Judge DUNIWAY. That is right. I think we could do a good job with that.

Mr. WESTPHAL. Now, you also point out that the New Twelfth, with the southern and central districts of California, plus Arizona and Nevada, with nine judges, would have a caseload of 171 per judge, which you state is too high.

Judge DUNIWAY. I do.

Mr. WESTPHAL. Even considering a 35-percent attrition rate? If you just play a numbers game here, in order to get the caseload in the New Twelfth with 1,538 filings down to this level of 129 per judge, which would be the level of filings in the northern circuit, you would have to employ some 11 or 12 judges——

Judge DUNIWAY. I would say 11.

Mr. WESTPHAL. All right. But you have also suggested that, you think that new southern circuit, if it were to be created, should start out with nine judges. You believe that, because it is a more compact circuit, it would be less crowded and that, even with 170 filings per judge and an attrition rate that may get up as high as 35 percent in some years, nine judges could conceivably cope with that caseload?

Judge DUNIWAY. I think so. I think they could do a better job than we are doing right now.

Mr. WESTPHAL. Do you think they could, with a caseload of 171 per judge, also have room to work on that so-called backlog of pending cases, which in the instance of at least some civil cases, is running some 8 to 24 months behind?

Judge DUNIWAY. Well, that is a harder question to answer, but in this last year—the 1974 year—we disposed of a total of 190 cases per judge. That would be a lower figure than we dispose of this year. If they could keep up the 190 rate, they could begin to reduce the backlog. While some of our cases are old in our civil backlog, I would say it is only about 600 cases approximately. They would have—I don't know the figure, the breakdown of the course of these cases—but they would have, I guess, better than half of those 600.

Mr. WESTPHAL. They would have better than half of the total caseload and about all they can do is assume a pro rata disposition.

Judge DUNIWAY. I couldn't be specific about it.

Mr. WESTPHAL. I think in your statement you demonstrate the extent of the so-called backlog we are talking about in the existing ninth circuit by reporting that, as of the time when the court quit hearing arguments in one particular year, there were some 601 cases in which the record had been filed and all the parties had filed their briefs, so that those cases were then ready for calendaring and decision by the court, but still the court didn't reach them and had to carry them over into the next year.

Judge DUNIWAY. Yes—well, it really isn't a matter of carrying them over into the next year, because we don't really operate on a term, but as of any given month, that is about the figure that we have that we haven't been able to get to that month.

Mr. WESTPHAL. The figures indicate, in some of these exhibits that have been included in the record here——

Judge DUNIWAY. I think, by the way, that 601 cases is the September 24, 1974, figure. I got it just before I came back.

Senator BURDICK. Are those cases in which there hasn't been any oral argument?

Judge DUNIWAY. That is right, civil cases, fully briefed, but not yet calendared for argument. They will vary in age from 90 days perhaps, on some expedited preferred types of cases, to as much as 2 years on civil cases with no preference. As you know, Senator, there are about 30 Federal statutes that give various types of cases preference on the calendar. We find it very hard to be sure that every one of those gets some kind of a preference.

Senator BURDICK. Judge, we are trying to help you. We have passed a no-fault insurance bill, and taken care of some cases occurring on the high seas. We have done a little to help, too.

Judge DUNIWAY. Sure.

Mr. WESTPHAL. Just to complete the point I was pursuing a moment ago, Judge—

Judge DUNIWAY. I didn't mean to interrupt you.

Mr. WESTPHAL. There is no interruption at all when the chairman speaks, Judge. But I would like to direct your attention to committee exhibit E-12. It covers cases terminated in 1973 after oral argument or submission on briefs. In the ninth circuit, there were some 1,343 cases included in that study. The study indicates that the average time for all cases—and this would be criminal, civil, cases with priority, cases without priority—the average time that elapsed from the time when counsel had filed their last brief until the case was orally argued was 156 days, which was the highest of any of the circuits in the country. That means that over 5 months pass before the court can get around to hearing cases that have been fully ready for the court to hear.

Judge DUNIWAY. That is right. You see, that means with the non-preferred type of civil case it is much worse, because with our criminal cases now, we are hearing them much faster than that.

Mr. WESTPHAL. Judge, you mentioned that you don't see many problems with two districts of California in one circuit and two districts in another circuit. You suggested that, to the extent that that may present a problem, there is a possibility that, if there is pending for trial, let's say, at the same time, a case in the southern district of California and a case in the northern district of California, each of which involves the question of the propriety or legality of some action taken by a State agency, it would be possible to use a procedure analagous to a multi-district panel in order to have those two cases involving that same issue effectively consolidated for trial and so on. Is that your suggestion?

Judge DUNIWAY. That is right. There is another possibility there, also. There are some statutes dealing with our review of Federal administrative agency decisions which provide that if attacks on the decision of the administrative agency are filed in two circuits, the circuit in which the first case is filed gets them all and they are transferred. We frequently will transfer a case of that type to another circuit court, because there is already one pending there raising issues out of the same proceeding or something of that type.

Mr. WESTPHAL. Any such transfer should not be a transfer just for pretrial handling, but also a transfer for trial?

Judge DUNIWAY. Sure, full disposition.

Mr. WESTPHAL. All right.

Do you think it is feasible, within the structure of our judicial system, to create a court of a multidistrict panel of that type, one which would operate only insofar as the ninth and the twelfth circuits are concerned, having the power to transfer only those cases which have an effect on the operation of either the California State government or of some other—

Judge DUNIWAY. Constitutionality of the California statute.

Mr. WESTPHAL. Yes.

Judge DUNIWAY. I don't know why that couldn't be done, Mr. Westphal. I don't see any real obstacle.

Mr. WESTPHAL. It could be a separate panel from the national multidistrict panel which the Federal court system has?

Judge DUNIWAY. Oh, yes. I would think it could be created solely for this purpose and operate much more simply, because it would be dealing only with the possibility of cases in four districts.

Mr. WESTPHAL. You suggest to this subcommittee that you perceive of nothing that could be recommended by the so-called Hruska Commission in the second phase of its study of our appellate court system which, in your opinion, would obviate the necessity of making some kind of realignment of the second circuit?

Judge DUNIWAY. That is my belief.

Mr. WESTPHAL. One of the things considered in phase two of that Commission's deliberations is the possibility of a separate, or specialized, court that could handle tax cases and possibly also patent cases, either combining them in one court or separate courts and changing some of our present jurisdictional statutes as they apply to tax and patent law.

Is the volume of either of these types of litigation in the ninth circuit sufficient enough so that the removal of tax and/or patent cases, singularly or in combination, would reduce the caseload of the ninth circuit sufficiently below this 2,700-case figure that it now has?

Judge DUNIWAY. I can't answer that question with specific figures, but I know that if I am a typical member of the court, the number of tax cases and patent cases that I get in proportion to the total workload is so small that it would make, in my opinion, very little difference. I think the buildup of the caseload in 1 year would take care of the difference, but I don't have any figures. Anything which would reduce our caseload obviously would be helpful to us.

Mr. WESTPHAL. Judge, you and I have referred to an attrition rate of approximately 35 percent.

Judge DUNIWAY. That has been our experience.

Mr. WESTPHAL. I am just looking at this special study which the Administrative Office did for the courts of appeals for calendar years 1972 and 1973. This is an exhibit included in the hearings which this subcommittee had in connection with S. 2991, the so-called omnibus circuit court judgeship bill, so we can take cognizance of it.

In 1973, out of a total of 2,109 terminations, this report indicates there were 116 that were terminated principally by consolidation of cross appeals, and also 131 dismissals, for a total of 247. Out of the total, that would be approximately 11 percent. I think this is, at least in the prior hearings the subcommittee has held, the recognized so-called attrition rate. Consolidations, cross appeals, and dismissals as a result of settlement or want of jurisdiction or something of that

kind have been our focus point. There has also been made a suggestion that, in lieu of a geographical realignment or a split, that the ninth circuit should be divided into two divisions or sections for administrative purposes. This is what we call the so-called chambers or divisions theory. As I recall your testimony, you stated that, unless it were compartmentalized in some way, you would still have the scatterization effect and the loss of time through travel, and inefficiency resulting from having to circulate an opinion that you have now; is that correct?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. On the other hand, another thing you point out is that with this so-called division for administrative purposes, if the Congress were to create the five additional judgeships that the ninth circuit has asked for and which the Judicial Conference has approved, you would then have a total bench of 18, and the en banc process would be one of 18 judges, unless Congress were to stipulate some lesser number which would constitute an en banc panel. You would then probably be adding to the difficulty that you have now in the ninth circuit of one three-judge panel not knowing what another three-judge panel may be in the process of deciding with reference to substantially the same legal question.

Judge DUNIWAY. I think that is correct. It seems to me that, if the division were to mean anything, it would have to mean that you would have one group of judges primarily hearing appeals in the proposed new twelfth circuit and the other group continually engaged in appeals from the proposed new ninth circuit, and pretty soon you would be having two separate courts in both effect and substance. I think this would make it more likely, rather than less likely, that the 18, or some substitute number, would have to from time to time get together to see to it that the law of those courts, which are really functioning as separate courts, was a unified law.

Mr. WESTPHAL. Judge, one final question. By whatever size, shape or description a change is made in the ninth circuit, in your opinion, must it be such a change that it results in the employment of more than 13 circuit court judges toward the judicial business of the present ninth circuit?

Judge DUNIWAY. Unless the number of judges were increased to 18, at least, there would be no use in doing it, in my opinion.

Mr. WESTPHAL. Thank you, Judge.

I have no further questions, Mr. Chairman.

Senator BURDICK. Thank you, Judge. You have been very helpful.

Judge DUNIWAY. I appreciate having had the opportunity to appear and testify.

Senator BURDICK. I have another vote coming up, but if Mr. Abel would like to start, we will continue, while I am voting, with the staff.

STATEMENT OF BRENT ABEL, PRESIDENT, CALIFORNIA STATE
BAR ASSOCIATION, ACCOMPANIED BY JORDAN A. DREIFUS,
CHAIRMAN, CALIFORNIA STATE BAR COMMITTEE ON FED-
ERAL COURTS

Mr. ABEL. Thank you, Mr. Chairman.

My name is Brent Abel, president of the State Bar of California, and I have with me Mr. Jordan A. Dreifus, who is chairman of our State bar committee on Federal courts. If the chairman please, I would like to ask Mr. Dreifus to sit with me and supplement my remarks and assist in the answering of questions from his standpoint, which is that of superior wisdom to mine.

Senator BURDICK. Very well.

Mr. ABEL. I want first to address the general question of what is in the public interest here. Before doing so, let me point out that we have filed a written position paper about this matter, reacting to the proposal of the Commission for the Realignment of the Ninth Circuit. The board of governors of the State bar has adopted that report as our position.

Senator BURDICK. Your entire statement will be made a part of the record at this point.

Mr. ABEL. Thank you.

STATEMENT OF THE STATE BAR OF CALIFORNIA.—OPPOSING THE PROPOSAL TO DIVIDE THE STATE OF CALIFORNIA INTO TWO FEDERAL JUDICIAL CIRCUITS, AS PROPOSED BY THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

A. INTRODUCTION

In late November, 1973, the Commission on Revision of the Federal Court Appellate System (hereafter "Commission") made public and distributed its draft of a report entitled, "The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals". This draft report was published in West's *Federal Reporter* pamphlet, 484 F.2d No. 3, and first came to the attention of interested members of The State Bar, particularly the Federal Courts Committee of The State Bar, in early December, 1973. On December 18, 1973, the Commission formally adopted the draft as its report, with a change in the title and some textual changes, but with no change in its basic recommendation. The report, as adopted, has been published in West's *Federal Reporter* pamphlet, 487 F.2d No. 4, February 4, 1974. The governing statute which created the Commission, 28 USC § 41, required the Commission to act within very short time limits.

Regarding the Ninth Circuit and particularly the State of California, the Commission's recommendation is that this state be divided into two separate judicial circuits by dividing the Ninth Circuit and placing roughly one half of the state into a newly created federal judicial circuit, leaving the remainder in a smaller Ninth Circuit.

We of The State Bar of California are strongly opposed to the Commission's proposal to divide the state. Our opposition stems from a careful consideration of the proposal, the facts and realities of the case load of the Ninth Circuit, the alternatives available, and important historical, political, social and economic facts and circumstances which the Commission may have overlooked.

Having considered all of these matters, it is the firm conclusion of The State Bar of California that:

(1) The entire State of California should remain in one judicial circuit, regardless of how the circuit may be realigned.

(2) Regardless of any realignment of the judicial circuit or the creation of any new circuits, the number of circuit judges in the circuits covering the states now included in the Ninth Circuit must be substantially increased, and other measures must be taken to hear and decide the back-log of cases in the Ninth Circuit Court of Appeals. These cases will confront any successor court or courts embracing the territory of the Ninth Circuit.

B. EXISTING INSTITUTIONS AND PRACTICES

In order to make it clear why we are so firmly opposed to the Commission's plan, we recite some of the basic principles and practices under the present court structure.

(1) *Maintenance of stability of the law within California under the existing Ninth Circuit practice (Stare decisis)*

Ever since the first creation of the circuit courts of appeals by act of Congress in 1891, those courts, the Ninth Circuit included, have maintained certain jurisprudential principles and practices which are of fundamental importance and which are pertinent to the matters here under consideration.

The sole purpose of the Congress in 1891 when it created the circuit courts of appeals (as they were then known) was to take from the Supreme Court the great burden of direct appellate review of federal trial court cases, a burden which had become impossible for the Supreme Court to carry by 1891. It was thought that by delegating this major burden of federal appellate work to a new level of intermediate appellate courts, the Supreme Court could devote itself to ". . . cases of public concern . . ." and still have ample time to "supervise" the circuit courts of appeals, ". . . to avert diversity of judgments and guard against inadvertance of conclusion . . ." at the new intermediate appellate level. *In re Woods* (1891) 143 U.S. 202, 12 S. Ct. 417, 418. It was anticipated that there might be temporary conflicts in decisions between the circuit courts of appeals, but it was also anticipated that the Supreme Court would resolve any such conflicts.

The circuit courts of appeals functioned with only three judges each for a number of years after 1891. Due to continually increasing case loads, the number of circuit judges in most of the circuits was increased so that today most of the circuits have many more than the original three judges. The purpose of increasing the number of judges was to increase the number of three-judge panels to dispose of the burgeoning case loads. It was and is the intent of the law and the routine practice, codified in 28 USC § 46(c) that the courts of appeals sit and function in panels of three judges.

Notwithstanding the existence of a multiple number of circuits, and the growth of multiple numbers of three-judge panels deciding cases in each circuit, the whole system has worked because of adherence within each circuit to the rules of *stare decisis*, to the end that there is stability of law in each circuit, subject to review by the Supreme Court. The applicable rules and their corollaries operate as follows:

(a) As between circuits, it is the duty of the Supreme Court to ". . . avert diversity of judgements . . .". *In re Woods, supra*; see also: Supreme Court Rule 19(1) (b).

(b) As between circuits, the decisions of a court of appeals of one circuit are not binding upon and need not be followed by the court of appeals or the district courts of another circuit. *Allstate Insurance Co. v. Stevens* (9th Cir., 1971) 445 F.2d 845; *Waters v. American Auto Insur. Co.* (D.C. Cir., 1966) 363 F.2d 684; *Jaben v. U.S.* (8th Cir., 1964) 333 F.2d 535, *affd.* 381 U.S. 214.

(c) Within a circuit, each three-judge panel of the court of appeals is bound by prior circuit decisions (rendered by three-judge panels) which are held to establish the law of the circuit. In other words, if a point has been once decided by a three-judge panel in a circuit, later cases decided by the same or any other panel of the same circuit, under principles of *stare decisis*, must follow the first decision as the binding precedent within the circuit, regardless how persuasive may appear to be the views of cases decided in other circuits. *Oliver v. U.S.* (9th Cir., 1968) 396 F.2d 434; *U.S. v. Cooper* (5th Cir., 1972) 462 F.2d 1343; *Powell v. U.S.* (7th Cir., 1964) 338 F.2d 556; *Ashe v. C.I.R.* (6th Cir., 1961) 288 F.2d 345. A corollary to this rule is that a three-judge panel of the court of appeals cannot presume to overrule an earlier precedent by the same or any other three-judge panel of the same circuit no matter how much the later panel may disagree with the earlier decision. *Charleston v. U.S.* (9th Cir., 1971) 444 F.2d 504, *cert. den.* 404 U.S. 916.

(d) The court of appeals has the power, recognized only in relatively recent years, if it chooses, to sit *en banc* and decide a case or rehear a case previously heard by a three-judge panel, by all of the circuit judges in regular active service acting as a single panel. By *en banc* action, the court may overrule prior circuit decisions, establishing the law of the circuit and resolving apparent conflicts between panels which have arisen in spite of the *stare decisis* principle mentioned above.

The most frequently applied and important of these rules is the rule that decisions must follow prior decisions within the same circuit. This rule is routinely applied by the district courts and the court of appeals, and makes it possible for a multiple panel court of appeals to meet one of the basic objectives of American law, that the decisional law be stable, predictable and ascertainable.

Next in importance, in our judgment, is the availability of the Supreme Court as the means, not only of preventing the development of conflicting doctrines between and among the several circuits, but also of correcting erroneous decisional rules of the courts of appeals.

Lesser used is the power of the court of appeals to convene itself *en banc* and hear or rehear a case in that manner. It is established that *en banc* procedure is employed only in the court's own discretion and is not available as a matter of right. *En banc* procedure is used with comparative infrequency. A decision of the circuit *en banc* can only affect the decisional law *within* the circuit.

(2) *Uniformity of practice and procedure in California*

California has achieved a high degree of uniformity and standardization of practice and procedure in all its aspects, especially in the state court system throughout the large territory of the state. In the state courts we now have a complex and sophisticated system of statutes, rules and forms which are accomplishing the efficiencies to be expected from the uniformity and standardization of many of the details of practice. Traditionally, Californians in general, and the lawyers of this state in particular, have always treated the state as a single community. It is common for attorneys from one part of the state to practice in another part. This is particularly true in that attorneys from one large metropolitan area, such as Los Angeles, do not hesitate to conduct litigation in other metropolitan areas, such as San Francisco, and vice versa. This is facilitated by the degree of uniformity and standardization of state practice that has been achieved.

The federal trial courts in California are divided into four federal judicial districts. For those California attorneys who tend to specialize in those areas of the law in which there is frequent resort to the federal courts, it is routine and common practice to appear in and conduct litigation in any of these four districts, regardless of the district in which they reside. In short, California is a single territorial entity for the purpose of trial practice, especially in the federal courts.

Uniformity, standardization and consistency of local rules, practices and procedures is certainly necessary and desirable as an objective in the federal courts in California as it is in the state court system. The principal method of achieving and maintaining uniformity of federal court practice has been through cooperative effort, comity and agreement among the district judges of the several federal districts, but always under the potential paramount authority of the Judicial Council of the Ninth Circuit to impose uniformity of local practice under its statutory authority to make local practice rules (28 USC § 332). The State Bar and its appropriate committees, such as its Committee on Federal Courts, as well as the federal courts committees of the larger county bar associations in the state, are actively interested in and are doing all they can to encourage and assist the achievement of uniformity, standardization and consistency of practice and of local practice rules among the several federal districts in California.

The importance of this matter of uniformity of local practice rules in the federal courts is illustrated by a problem which arose several years ago concerning requirements imposed on the admission of non-resident attorneys. It developed that one or more of the federal districts were following practices and imposing requirements as to admission of non-resident attorneys at variance with those of the other districts and with those of The State Bar itself for practice in the state courts. After efforts by the organized bar, local federal court rules were promulgated on the subject of admission to practice. These rules in the several federal districts are substantially uniform with each other and with the state court practice on this important subject. The fact that all four of the districts were in one circuit certainly aided achievement of uniformity of practice in this instance.

(3) *Maintenance of institutional unity of the law applied by the Federal courts within the State of California and the need to maintain "institutional unity" of applicable law for the State as a whole*

This state comprises nearly one-tenth of the population of the United States and nearly one-twentieth of the total land area. It is, in population, the largest

state in the union. Because of its size (five times that of the average state) and resources, the state has developed into a highly integrated political, social, economic and legal entity. We are proud to say that in matters of state law, state legislation and governmental administration, California and its institutions have developed a degree of competence and sophistication at the state level which we believe is not exceeded by any other state. The Commission itself refers (Report, Part III, § 2) to the "well-developed jurisprudence of the California legislature and courts."

But the matter is not so simple. Whether fortunate or unfortunate, and whether we like it or not, in the last thirty or forty years there has been an accelerating and pervasive application of federal law, and of the federal constitution, statutes, regulations, decisional law, regulatory, operational and administrative programs, and financial involvement of the federal government in many activities and functions of state and local governments and of individuals, entities, and organizations throughout the state. In many areas and as to many functions in law, administration and regulation, we seem to have a body of law applied in the State of California which is really composed of various mixtures of rules of the state law and the federal law. Examples include the following:

(a) California has an elaborate and comprehensive body of law, statutory and decisional, covering criminal law and procedure and custodial treatment of persons and penalties, punishments and forfeitures. But it is part "federal" law, because there has been a tremendous "federalization" of criminal law and procedure and of the rights of persons in custody, and a coextensive expansion of federal court jurisdiction for review of these "federal" matters. Included in this, for example, is federal *habeas corpus* review of state criminal convictions or the treatment of prisoners held under state convictions.

(b) The same kind of "federalization" has occurred in numerous areas of law and public administration, and federal law is held also to govern the relations and transactions of private parties insofar as they may be "state action" and may involve civil rights, equal protection, due process, etc. Here, the litigated issues are always a mixture of the state law, subjected to a paramount federal standard; and most, if not all, of the litigation is in the federal district courts, subject to review in the court of appeals.

(c) In many new areas, the Congress is enacting laws which provide an overlay of federal standards or paramount rules over state law. Consider, for example, "truth in lending" and pollution and environmental standards.

(d) The State is, in reality, a "partner" or "subsidiary" (really the territorial delegate) of the federal government in many operational programs which are financed in whole or in part by the federal government and subject in a greater or lesser degree to requirements of federal law or regulation. Such a program is, in name, the operation of a statewide agency. But, in litigation, usually in the federal courts, it develops that there are complex and delicate interrelationships of state and federal law, and regulation subjected to the interpretation of the federal courts. Consider, for example, the welfare and similar aid programs, and functions and projects subject to federal environmental and similar regulatory requirements.

(e) In a number of well-known and traditional areas, the federal statutes, systems or programs adopt as their content the law of the state. But the nature of the statute, program or system is such that all or the major part of the court litigation must be in the federal courts and not the state courts. Here, the "tail wags the dog", where the federal courts are the courts which make most of the "state" law. Examples of this are actions under the Federal Tort Claims Act, tax cases, bankruptcy cases and others where the federal law has expressly adopted areas of state law as the content of the federal law. Aviation accident cases are an example, especially in cases involving large aircraft. Most of the decisional law in these cases is in the federal courts, even between private parties, because the United States itself is almost always involved in some operational manner, and the government can only be joined as a party in the federal courts. (A perusal of the supplement of West's *California Digest*, "Aviation", §§ 141-191, shows that most of the decisional law digested in recent years is that of the federal district courts and the Ninth Circuit.)

It is not the purpose here to theorize or to evaluate whether this great and pervasive involvement of federal law into the smallest details of the legal, political, social and economic life of the state is good or bad, but merely to describe it as it is. We think this has an important bearing on the organization of the federal courts to deal with the legal situation as it, in fact, has developed. We

believe a fair characterization of the matter is that there is a large body of interstitial federal law applicable to the State of California and the systems, institutions and programs of the state as a whole, and that the state represents a territorially differentiated subdivision in many matters of federal law, as well as retaining its identity in terms of state law.

To the extent that the United States Supreme Court itself has not made the federal decisional law absolutely uniform respecting all of these matters, the federal courts in this state, including the Ninth Circuit, make the "federal law of California". On some subjects, as pointed out above, the federal courts really decide most of the cases, albeit under "state" law. In the past five or ten years, federal court intervention has grown enormously in the areas of applying federal standards of constitution, law or regulation, to the supervision of all kinds of "state action" and state programs which have any kind of involvement with federal money or other federal control.

We suspect that the accelerated growth of federal court litigation in some of the areas just mentioned might be, in large part, responsible for the great case load increases experienced in recent years. Also, cases in these areas may present more difficult issues of federal law and policy, and of state laws measured against paramount federal law and policy, taking more time of the courts than the more familiar type of diversity of citizenship litigation between private parties governed by state law.

Any current volume of the *Federal Supplement* or the *Federal Reporter* reveals a high proportion of decisions in federal cases of this character. These decisions frequently require long and complex opinions. They are to be compared with the types and kinds of federal cases and decisions reported forty, thirty or even twenty years ago. In the office of the Attorney General of this state, and in counsel's offices of various state and local government agencies and entities, whose activities are affected by overriding federal constitutional, statutory or regulatory requirements, constant and routine reference to federal cases, federal statutes and federal regulations and frequent participation in federal court litigation now has become necessary in the representation of their respective agencies and entities.

The office of the Attorney General of this state has furnished us with statistics of federal cases to which the State, its offices and agencies have been made parties, as follows:

Civil Law: Over the past three years civil cases have been filed involving the State as follows:

Northern district	94
Central district	171
Eastern district	66
Southern district	18
Total	349

Criminal Law: As of January 1, 1974, the State was represented by that office in pending civil rights and *habeas corpus* actions in the Federal District Courts as follows:

Northern district	348
Central district	399
Eastern district	224
Southern district	50
Total	1021

The burden of cases involving the State as a party has been equally significant at the circuit court level. In the last three years 58 civil cases have been docketed in which the State is a party. During the same period 179 criminal cases have been docketed in which the State is a party. The statistics confirm what is said above about the interrelationship of federal and state law which has now developed.

Stare decisis, and stability and predictability of the law in decisions on federal law affecting the state as whole are therefore of great importance. This means maintaining the "unity" of federal decisional law in this state. In theory, total unity of federal decisional law for the whole country is to be maintained by the United States Supreme Court, but this is certainly not the situation in fact. In practice, the Supreme Court in recent years has not had the time to do other

than accept a few cases and establish broad general rules in various areas of the law. As a practical matter, absent Supreme Court action, unity of federal decisional law applicable to federal court cases arising in one state, such as in California, has been left to the court of appeals of the circuit embracing that state.

In our judgment, the role of the court of appeals of this circuit of supervising and unifying the law applied by the four federal district courts of this state respecting matters of statewide interest, which are subject to federal law or in which law of the state really furnishes the content of the federal law applied, is that court's most important role; and the objective of that role is to assure and maintain "institutional unity" of all the law applied throughout the State of California.

The "institutional unity" of the whole state and of the law applied throughout the state must be a fundamental objective. Such unity of applied law is consistent with the strong feeling of the people of the state in general, that the state is and always has been a single community in all respects. It is worth noting, in this connection, that on a number of occasions, since 1850 when California was admitted to the Union, there have been abortive attempts or suggestions for one purpose or another to divide this state, usually into a "north" half and a "south" half. All such attempts have been resoundingly rebuffed by the people and their elected representatives, and all such concepts are discredited by history. The people of this state and their elected representatives are cognizant of these historical facts. Any proposition for the territorial division of a statewide institution which bears a resemblance to such past proposals no doubt would arouse the resentment and opposition of the great majority of the people of this state.

C. CRITICISM OF THE COMMISSION RECOMMENDATION TO DIVIDE CALIFORNIA

(1) *The Commission's proposal to divide the State of California is wrong*

First, we emphatically make clear that we agree with the Commission that more circuit judges must be appointed to the Ninth Circuit, or to any successor court or courts embracing the same territorial jurisdiction, in order not only to stay abreast of the growing case load, but also to dispose of the backlog of appeals, and bring the court (or successor courts) as current as practicable in its disposition of cases.

The Commission's Report is concerned about certain practices now employed in the various circuits, such as elimination or reduction of oral argument, use of unpublished memoranda and orders in lieu of published opinions, the greater delegation of work to law clerks, etc., and to this extent we share the concern of the Commission. But all of these practices are attributable to the failure to appoint a sufficient number of judges to accommodate the accelerated growth of the case load. This problem is present regardless of how the circuit as a whole is organized or aligned.

We emphatically disagree with the method proposed by the Commission insofar as it involves the division of the State of California between two circuits.

The proposal of the Commission to divide California must be evaluated in light of the premises which have already been set forth at length. Such an evaluation demonstrates the proposal of the Commission, in this respect, is unwise and erroneous.

A careful reading of the report shows that the Commission focused its attention on certain difficulties which the Commission felt would be intolerably aggravated if more and more circuit judges were added to the existing circuits as the simple solution to the case load.

But the only really specific reason given by the Commission for the conclusion that no circuit should be permitted to have more than a certain number of circuit judges is that doing that would impair the ability of the court in "avoiding or resolving intra-circuit conflicts" (Report, Part II, respecting the Fifth Circuit), and would impair the court's own "institutional unity". The Report states that "attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved" (Report, Part III, respecting the Ninth Circuit). In a number of other places the Report contains generalities about the "serious problems," etc., to be encountered by a much enlarged circuit court. But the only "serious problem" which is specifically identified is the problem of intra-circuit conflicting decisions already mentioned.

It is difficult to guess what other substantial reasons the Commission has in mind. For example, the travel distances covered in the Ninth Circuit are nothing new. The Ninth Circuit has been the same size for many years, from a time before the age of the airplane and many other modern innovations. In the operation of clerk's offices, we know of no obvious economies in, for example, operating two clerk's offices, each for nine judges, instead of one office for eighteen judges. If there is some great economy in such a division, we assume the Commission would have said so. We, therefore, must conclude that the real concern of the Commission is its fear that such an enlarged court of fifteen or twenty more judges would be unable to maintain the "institutional unity" of the court, apparently because it is also thought that a court of such size cannot deliberate and make decisions *en banc*.

By its focus on this specific reason for the recommendations it has made, the Commission recognizes the importance of maintaining the "law of the circuit" and enforcement of the rule of *stare decisis* (although the Commission seems to prefer the term "institutional unity" to embrace these objects).

The Commission thus starts out by demonstrating the central importance of "institutional unity" as a thing to be nurtured and preserved. It then makes its recommendation to create new courts, with territorial boundaries which do not presently exist, but of a size which the Commission believes will have "institutional unity" within themselves. The fallacy of the Commission's recommendation is that it ignores the "institutional unity" of law applied in the State of California and the application to the whole state of the law of the Circuit. The Commission would sacrifice and dispense with the institutional unity of the law applied in the state for the sake of its own conceptions of court structure.

The same historical principles which made essential a single Supreme Court at the head of our whole federal system now should apply on a lesser scale, to assure unity of decisional law applied throughout the whole territory of this state. The axiom stated by Alexander Hamilton in the *Federalist*, No. 80, is as applicable now, to the federal courts in California, as it was to the entire nation when it was written :

If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

The proposal advanced by the Commission would divide California between two circuits, contrary to this basic and practical principle; it would leave review of federal court cases to "two heads", absent intervention by the Supreme Court.

We believe the Commission has misjudged the values at stake. We believe the courts exist to well serve all other institutions of society and not the reverse. The Commission's proposal to divide California into two circuits would be a disservice to this state and its institutions far exceeding any advantages of court efficiency, real or imagined, to be gained by such a division.

(2) *The premises of the Commission are doubtful*

We do not think the Commission has made out a case for any absolute limit of the size of a court of appeals, based upon any inherent limitation on the number of judges who should sit *en banc*. In other words, we do not understand why there should be a specific threshold or ceiling of nine circuit judges per circuit. Any time that a court of appeals acts *en banc* with more judges than the panel of three originally contemplated by Congress it is less efficient in the use of judicial manpower than the same number of judges acting in three-judge panels. The reason for acting *en banc* is to obtain the deliberation and wisdom of all of the judges instead of only three in the panel. It follows that nine judges acting as one nine-judge panel can only dispose of one-third the number of the cases the same nine judges could in three-judge panels. A court acting *en banc* with twelve judges or fifteen judges would be proportionately that much less efficient than a nine-judge court, and a five or seven judge court would be proportionately that much more efficient in its use of judicial manpower.

It is problematical whether a decision by nine judges will be wiser or more correct than one made by only three. In any event an *en banc* decision is no more binding outside the circuit than any other decision of the same court. No matter how many respected circuit judges agree *en banc* on a decision, it

is still subject to reversal by the Supreme Court. See, for example, *United States v. F & M Schaefer Brewing Co.* (1958) 356 U.S. 227, 78 S. Ct. 674, in which a divided Supreme Court reversed an *en banc* decision of the Second Circuit. Very recently, there have been cases with eight judges acting, *Laundry, Dry Cleaning, etc. Workers v. Mahoney* (8th Cir., 1974) 491 F. 2d 1029; twelve judges, *United States v. Sacco* (9th Cir., 1974) 491 F.2d 995; and fifteen judges, *Morrow v. Crisler* (5th Cir., 1974) 491 F.2d 1053.

We do not suggest here that it is desirable that any court should act with 15 or 20 judges as one panel. But if a court does so, the difficulties and efficiency lost are only relative compared, for example, with a court acting with nine judges. Actually, there are a number of devices described below which might be enacted to provide for the effect of *en banc* adjudication to establish or change the decisional law of the circuit without requiring all the judges to act.

The State of California has nearly ten percent of the nation's population and generates about the same percentage of court appeals cases (1543 out of the national total of 15,629 for Fiscal 1973, according to the Report, Part III, App. I). By prudent standards the case load arising in California alone should require eleven circuit judges, the national average of all the circuits being 144 cases per judgeship (Report, Part III). This would justify California alone to be made into a judicial circuit.

While we do not necessarily suggest it as the only possible solution, we believe the views of the Commission, critical of the idea of a circuit composed only of this state, are wrong. We find astonishing the Commission's inference that there would be a "lack of diversity of background and attitude" in a court of judges chosen from this state. On the basis of our knowledge of the size, history, economics, society and politics of this state and the diversity of its people, we firmly disagree. It may be that the assumption that one state should not make up one circuit has some validity when applied to the average state of four million people. But the conclusions and value judgments that flow from such an assumption should not be applied to the consideration of a state that is typical of five average states.

The Commission also fears one senator might dominate the court because of traditional senatorial power over appointments. For similar reasons we think there is no basis for such concern. The political history of the state and foreseeable future political conditions demonstrate that any senator from California who would hope for tenure in office would have to represent, and be representative of, the diverse elements of the state in a way which is inconsistent with the kind of provinciality feared by the Commission. In any event, a circuit composed of California and one or two neighboring states would be dominated by California judges anyway, in the same manner New York dominates the Second Circuit. That a senator of long seniority can "mold" the federal courts of his state is a novel criticism. Every district court is subject to senatorial control of appointments in the same manner. But we have not heard such criticism of the district courts. Certainly no one familiar with the district courts in this state would even consider it.

The Commission also seems to believe that unless at least two or more states are included in one circuit, the result is automatically antiethical to "principles of federalism," and that in the creation of new circuits, at least two or more states or parts of states must be included in a circuit, out-weighting other considerations. We do not understand the basis for this "two-or-more-states" concept to be such an essential condition for maintaining "principles of federalism" without regard to the circumstances of the particular situation of California. With all respect to the esteemed Committee of the American Bar Association whose conclusion is quoted by the Commission's Report, we do not believe that the conclusion stated should be applicable in the case of this state. We again note the example of the Second Circuit, which is fairly dominated by the State of New York, with six out of eight of its judges from New York. See 486 F.2d viii. We have never heard anyone say that the Circuit Judges of the Second Circuit suffer from parochialism, provincialism or any lack of devotion to "principles of federalism".

(3) *Procedural devices and arrangements cannot avoid or minimize the basic problem created by dividing this state into two circuits*

The Commission's Report begins with the basic premise of "institutional unity" of the courts. After stating the recommendation that California be divided, the Report discusses (in Part III, § 2) the conflicts and other problems

that must arise by so dividing the state. Curiously, the Report is ambiguous. It states two alternatives: (1) the conflicts will not be a large or serious problem after all; and, (2) it proposes a whole catalog of suggestions, some more specific than others, as to how various problems created by the division may be dealt with by various procedural devices.

In attempting to minimize the effects of dividing the state, the Report is inherently inconsistent. On the one hand its basic premise is the importance of "institutional unity". On the other hand it seeks to minimize the effect of dividing the state by discounting the effect such a division will have on the "institutional unity" of the law applied over the whole state. Furthermore, the space and attention the Report gives to this point and its elaboration of various sorts of special procedures and devices to avoid or overcome conflicts betrays a defensiveness which only emphasizes that the problem really is fundamental and important.

Two circuits in one state will no doubt create new opportunities for forum shopping. The Commission passes this off, merely noting that forum shopping exists today. But one cannot justify making a virtue of it. Forum shopping among the judicial circuits is a well-known problem in federal subject matters, such as in patent cases, and on the part of the government in tax cases. (See dissenting opinion of Justice Douglas in *U.S. v. Skelly Oil Co.* (1969) 394 U.S. 678, 691-692, 89 S. Ct. 1379, 1386-1387). It is easy to visualize what a field day litigants, especially state and federal government litigants, or interests adverse to such governmental litigants, will have with two circuits available in which to try for conflicting results in a second case if not satisfied with the result of the first case.

The Report (Part III, § 2) is vague on what devices might be needed in order to avoid or resolve the problems division of the state would create. It mentions that there are "at least half a dozen" mechanisms already available, such as transfers of venue, pretrial consolidation of actions by order of the Judicial Panel on Multi-District Litigation (under 28 USC § 1407), stays, injunctions, interpleader, etc. The trouble with most of these is that they are not really intended for intrastate use, and each of them involves a complex and expensive kind of threshold litigation and a burden upon the court and the parties which should not have to be undertaken unless necessary. For example, it is difficult to demonstrate the balance of "convenience" necessary to invoke 28 USC § 1404(a) if the transfer sought is from one California district to another. When an impasse occurs with conflicting rulings between courts in different circuits as to transfers or stays, etc., of the same subject matter, the Supreme Court must step in and decide the forum. See *Hoffman v. Blaski* (1960) 363 U.S. 335, 80 S. Ct. 1084. What would be needed to make the thing operate would be something equivalent to, but with substantially greater powers than, the Judicial Panel on Multi-District Litigation. The panel, under 28 USC § 1407, is able to order the transfer of multi-district litigation and consolidate the same, but only for pretrial discovery purposes. To accomplish what the Report has in mind would require a "California Panel on Multi-District Litigation" empowered to transfer and consolidate cases, not only for discovery, but for all purposes, or a grant of such added powers to the national Multi-District Panel for that purpose. But the suggestion of such provisions reveals their undesirable and unwieldy character. Why should litigants be saddled with such complicated preliminary procedures and transfer of cases, otherwise presumably unnecessary, but for the effects of division of the state?

The Commission's Report, in the next to last paragraph in Part III, § 2, comes down to an exhortation that the two new circuit courts of a divided California should show "sensitivity" and "comity and deference" to each other's prior decisions. With great respect to the Commission, such a pious hope does not change the rule that one circuit is not bound to follow the decisions of another, in spite of the "comity and deference" which must be assumed to exist between the existing circuits.

To sum up, we believe that the palliatives and ameliorating devices and mechanisms suggested by the Commission's Report cannot undo the fundamental damage that would be done by its proposed division of this state, and the Commission's Report itself reveals this.

D. ALTERNATIVES

(1) *Supreme Court functions*

If the Supreme Court had time, it would be the Supreme Court's function and duty to review and resolve not only conflicts between circuits, but also any conflicting decisions that arise between different three-judge panels in the same circuit. (See, for example, *U. I. R. v. Estate of Bosch* (1967) 387 U.S. 453, 87 S. Ct. 1776.)

In short, if the Supreme Court had the time to completely fulfill its functions, it would take care of the problem which has stimulated the Commission's recommendation to divide the circuit.

But it is stated by many that the Supreme Court is unable at this time to cope with the case load thrust upon it. In 1891 the federal subject matter was slight compared to the great federalization of many areas of the law which has now taken place. In 1891 there were but ten three-judge panels consisting of the then existing ten judicial circuits themselves (nine plus the District of Columbia). Now there are approximately one-hundred circuit judges, and a proportionate increase in three-judge panels turning out decisions from which review may be sought in the Supreme Court. It is not surprising that the Supreme Court can review only a few of these cases.

The real solution of the problem is, therefore, to provide for the performance of the review and conflict-resolution function which, under our federal system, was intended to be performed by the Supreme Court, but which that court is no longer able to perform.

This indicates to us that, with all due respect to the Commission and to the Congress in creating the Commission, the work which the Commission has been charged with doing cannot be done independently of or in advance of more fundamental actions which must be taken to alleviate or provide those review and conflict-resolution functions which are otherwise to be performed by the Supreme Court.

A great deal of work has been done by several groups who have made studies and recommendations concerning the creation of new tribunals to assist the Supreme Court or to take a delegated portion of the Supreme Court's jurisdiction. We offer no opinion on the merits or demerits of any of those proposals. The study group under the chairmanship of Professor Paul Freund made an extensive study and report which is found in 57 FRD 573. That report stated in two different places (57 FRD at 589 and at 593) that one of the primary functions needed to be performed by any such new tribunal would be the resolution of conflicts between the circuits (whether or not the case otherwise merited the attention of the Supreme Court itself).

This would also be a primary function of the "National Division" of the U.S. Court of Appeals proposed in the recent resolution of the ABA Special Committee on Coordination of Judicial Improvements (See ABA Journal, April, 1974, p. 453, 60 ABAJ 453).

It is our conclusion that a realignment of this judicial circuit and any realignment which would result in an increase in the number of judicial circuits must be accomplished only concurrently with and after or as a part of an overall resolution of the functions of the Supreme Court.

Review by a superior tribunal such as the Supreme Court (or some successor tribunal) is more efficient and more productive than the mode of "horizontal" review represented by *en banc* procedure in the courts of appeals. It was no doubt the growing case load of the Supreme Court over the years which encouraged the use of this horizontal method of review within the courts of appeals themselves. But for various reasons, some of which have already been mentioned, review by a court of appeals *en banc* of the court's own prior decisions is in some respects not very efficient or productive. A court of appeals acting *en banc* is still only a court of appeals, whether it has five judges or eighteen judges. Its decision is not binding outside the circuit any more than the decision of a three-judge panel. In the same circuit, three-judge panels in future cases are bound to adhere to the rule of decision created by the court acting *en banc*, but such adherence is required only by the principle of *stare decisis*. Adherence to principle is not quite the same as being bound to obey the decision of a higher tribunal.

The state court system in California is an excellent example of how a court system should properly operate without the necessity of *en banc* action on the part of lower or intermediate appellate courts. In California the state is divided into several appellate districts, in each of which sits a court of appeal.

as the intermediate appellate court of the state. Appeals are taken, as of right, from the trial courts to that intermediate appellate court. From that court there is a discretionary *certiorari*-like review available in the California Supreme Court. The Court of Appeal of the Second District, which embraces Los Angeles County, has twenty Justices, but the court acts only in panels of three. The court never sits *en banc*. It need never do so because any conflicts of decision between any panel and any other panel of any of the courts of appeal are promptly subject to resolution by the California Supreme Court.

The history of our California court system is worth noting in this regard. The intermediate appellate courts of the state were created in 1904. Prior to that time the California Supreme Court had direct review jurisdiction over all of the trial courts in the state, and found it necessary to sit in panels in order to handle its business. The procedure of sitting in panels and convening from time to time *en banc* was found to be unsatisfactory, and this led to the creation of the intermediate appellate court system, patterned directly after the circuit courts of appeals which had been created earlier in the federal system.

Perhaps it might be desirable and more efficient if the *en banc* procedure could be dispensed with entirely. This would only be considered, of course, if some tribunal or tribunals were created to assist in the performance of the functions of the Supreme Court in order to completely displace any need for *en banc* action in the courts of appeals.

(2) *Devices are available to avoid the need of an excessively large number of judges participating in en banc proceedings*

As pointed out above, it may be relatively less efficient for twelve, fifteen or twenty judges to participate in the decision of a single case, although it is by no means impossible or impractical for them to do so, as illustrated by some recent cases cited above. Nevertheless, measures could be enacted which could provide for a limited number of judges to be empowered to act for the circuit "*en banc*" and whose decision would be given the respect and adherence of an *en banc* decision for the purpose of resolving conflicts and establishing the law of the circuit.

In a way this is already done by the limitation of 28 USC § 46(c), in that the court "*en banc*" must consist only of the circuit judges who are in "regular active service." By liberal use of visiting judges, senior judges and district judges in its panels, a court of appeals is effectively operating with a larger number of judges than those eligible to sit *en banc*. Assume, for example, the court is operating with an average of six three-judge panels, each of which consists, on the average, of two circuit judges plus one "other" judge. The court is then operating as if it had the strength of eighteen judges deciding cases in panels. But for the purpose of acting *en banc*, the court consists only of the twelve circuit judges in regular active service. To carry the example further, suppose the court of appeals consisted of only seven circuit judges in regular active service, but that it made use of sufficient "other" judges to make up an average of six three-judge panels in operation. In that situation the court would be acting effectively with the strength of eighteen judges, but for the purpose of acting *en banc*, it would consist of only the seven circuit judges.

Thus has the statute, 28 USC § 46(c), effectually created two classes of judges, one class of whom is denied the power to sit *en banc*.

Some administrative agencies in the federal government appear to have adopted a similar type of organization. Thus a tribunal consisting of a large number of administrative law judges may have its judges divided into two categories, one being a "senior" category consisting of those who are given a special power to act "*en banc*" for purposes similar to which *en banc* procedure is employed in the courts of appeals. (See, for example, the Armed Services Board of Contract Appeals, which has thirty-five administrative law judges out of which there is chosen a "senior deciding group", CCH Contract Appeal Decisions, paragraphs 105 *et seq.*, 201 *et seq.*; 32 CFR § 30.1).

Aside from the permanent establishment of a specially empowered class of judges by means similar to that of 28 USC § 46(c), other methods are readily available by which a special group of less than all of the circuit judges of the circuit could be chosen equitably to perform the function of acting *en banc*. The group could be chosen at random from among the circuit judge membership (for example, seven could be chosen out of a total of fifteen or twenty circuit judges); or they could be chosen from time to time to serve for terms in a manner similar to that suggested by the Freund study group for the "National Court of Appeals" proposed in that study. (See 57 FRD, at 591.)

In any event, there are various methods for choosing an *en banc* group of circuit judges empowered so to act, but consisting of substantially less than all of the circuit judges of the circuit.

In addition, there might be other measures taken internally within the court of appeals which might tend to avoid conflicting adjudications where the same issue is pending at the same time before different panels of the same court. For example, perhaps identity of issues can be ascertained so that all pending cases with the same issue can be transferred to the panel which has the case with the lowest docket number. This "low number" principle is routinely followed in district courts which follow a random individual assignment system. At least this would avoid different panels of the same court announcing conflicting decisions in cases which were simultaneously pending.

E. DRASTIC MEASURES WOULD BE NEEDED TO ATTEMPT TO DEAL WITH THE PROBLEMS CREATED IF THE DIVISION OF THE STATE WERE CARRIED OUT

If the Commission recommendation were to be followed and the state divided into two circuits as proposed, certain drastic and novel provisions would be required to be enacted in order truly to solve the schism that would be created.

(1) *Joint powers over practice and procedure will be required*

We have already noted the importance of avoiding variations of practice and procedure among the several district courts in California if the state were to be divided into two circuits, this might end any hope of achieving further progress toward a desirable uniformity of local practice. There would be no one circuit judicial council to exercise the potentially broad rule-making powers provided under 28 USC § 332. (See *In re Imperial "400"*, etc. (3d Cir., 1973) 481 F.2d 41.) Notwithstanding the closely integrated statewide character of The State Bar, it would be obliged to attempt to work with and give its attention to two completely separate circuit judicial councils and two completely separate circuit judicial conferences.

In order to avoid all the destructive effects of such a division of functions between two circuits, it would be necessary to amend 28 USC § 332 to provide, in California, for some sort of inter-circuit council and other inter-circuit activity and organization so that the functions of 28 USC § 332 can be carried out with respect to the State of California. We do not know exactly what form this might take, but in whatever form, it would be absolutely essential.

(2) *Access to the Supreme Court would have to be provided*

If this division of the state is to be enacted before there is any provision for some new or additional tribunals to perform or assist in the performance of the Supreme Court functions of resolving conflicts between the circuits, then we think the State of California has a right to insist upon the enactment of provisions which would demand special attention from the Supreme Court in the resolving of conflicts created by the division of the state into two circuits.

This would require an amendment to 28 USC § 1254, imposing on the U.S. Supreme Court mandatory, non-discretionary appellate jurisdiction of any court of appeals decision, in a case which originally arose in a district court of a state divided between two circuits, in which it is claimed that the decision is in conflict with a decision of the other circuit respecting the law (state or federal) applied in the divided state. Such a provision, of course, would be in the teeth of all present observations of and criticism of the case load situation of the Supreme Court and a contradiction of the discretionary jurisdiction policy enacted for the Supreme Court in the Judiciary Act of 1925. But we believe the State of California, if it is to endure such a division of itself into two circuits, has a right to such special consideration.

Such a provision for special treatment by the Supreme Court of cases arising from California would be especially necessary in view of another change in federal court jurisdiction which is proposed to be enacted. We refer to the proposal to dispense with the requirement that a district court act with three judges (under 28 USC §§ 2281-2284) when it entertains a case to enjoin the constitutionality of a state statute, and like matters. The three-judge district court provision is due to be abolished because it is said to be a burden on the lower courts and upon the Supreme Court because of the direct access to the Supreme Court by the right of appeal provided for in such three-judge district court

cases. The abolition of the three-judge district court procedure at the same time would take away such relatively direct access to the Supreme Court on important matters affecting state governmental administration. If the division of the state into two circuits were to be carried out, The State Bar would find it necessary to oppose any abolition or restriction of the jurisdiction of three-judge district courts and the direct appeal to the Supreme Court unless some clear right of appeal is created for the purpose above stated of assuring resolution of conflicting decisions of the two circuits which would embrace California.

(3) *Special provision for coordination of multidistrict litigation within California would be required*

As already mentioned, it will be necessary to provide for coordination and consolidation for all purposes of multi-district litigation between and among the four federal districts in California. At present this can only be done for pretrial purposes under 28 USC § 1407. The California state court system already has provision for similar coordination and consolidation for all purposes. See California C.C.P. §§ 404-404.8. It will be necessary either to require that the judicial panel now existing under 28 USC § 1407 devote special attention to California to do this, or to provide for a special "California" panel, either as an independent entity, or as a delegate of the existing 28 USC § 1407 panel to carry out these functions.

F. CONCLUSION

In conclusion, The State Bar of California reaffirms its opposition to the proposal of the Commission that this state be divided into two federal judicial circuits, and with equal firmness recommends that if the Ninth Circuit must be realigned or new circuits created, the whole State of California be included within any division in a circuit, if necessary creating a separate judicial circuit out of the state itself.

At the same time, The State Bar strongly recommends a substantial and immediate increase in the number of judges available to sit on the court of appeals.

Finally, we believe a comment is in order concerning the fact that this statement is submitted several months after the Commission performed its statutory duty of rendering its report on December 18, 1973. The statute which created the Commission, 28 USC § 41, note, imposed a stringent 180-day time limit in which its report had to be rendered to the Congress. That time limit expired on December 18, 1973. Unfortunately, the Commission did not publish its preliminary report until mid-November, 1973. That preliminary report first became generally available to us through the courtesy of unofficial publication in West's *Federal Reporter* pamphlet dated November 19, 1973. It, thus, did not become generally available to members of the Bar until about November 25, 1973 or later, when the *Federal Reporter* was normally received in the course of the mail. Yet, the notice accompanying the preliminary report states:

. . . we invite comments and suggestions from all concerned and ask that they be placed in the hands of the Commission as soon as convenient and in any event *no later than December 5, 1973*, so that they may be considered in the preparation of our final report . . . [emphasis added].

By the terms of that notice, not only The State Bar of this state, but the entire nation, were expected to comprehensively consider the Commission's proposals and prepare and send to the Commission their thoughtful and considered views on the same, within the space of about one week. We cannot blame the Commission for this unfortunate procedure; its hands were tied by the statute, and it was all the Commission could do, within the 180 days allotted to it, to assimilate the materials it obtained and formulate its own views. In addition, it should be pointed out that the staff of the Commission did what they could to cooperate with The State Bar of California and its Federal Courts Committee within the stringent time limitations described above. By the same token, the Congress must recognize that the Report of the Commission, dated December 18, 1973, could not and did not take into account the views of The State Bar of California, which are contained in this Statement, and that the submission of this Statement is the first reasonable opportunity for The State Bar of California to make its views known concerning the Commission's recommendations.

Mr. ABEL. The principal point I want to make this morning is that the State Bar of California is opposed to the division of California into two circuits. In approaching that question I do so initially from

the standpoint of what is in the public interest. It seems to me of vital importance that whatever we can do in the institutions related to justice these days to introduce certainty into the decisionmaking process, or to reduce uncertainty is worth doing. We should shape our institutions to meet that end rather than shape the public need to fit our institutions.

More specifically, let me suggest this, and I don't think that this is a chamber of horrors, as my old and good friend, Judge Duniway has said. There are, in our Federal courts these days, an increasing number of types of cases where there is an overlay of Federal aspects, whether statutory or constitutional, in the interpretation and enforcement of State laws. Mr. Dreifus can amplify that with a number of examples. The kind that occur to me immediately relate, for example, to our California Coastal Commission which was created within the last couple of years. In the carrying out of its duties a number of constitutional issues are presented.

Now, if California is divided into two circuits, I am not saying that one circuit would differ with the other as to the result. I *am* saying that the creation of two circuits would be an invitation to every client and every attorney to seek a different result in one circuit from that which has been determined in the other. I don't see how you can escape that likelihood. That has two effects: First, it seems to me that it reduces the confidence of the public in the certainty of the law when, in all good conscience, an attorney may say to his client, "the twelfth circuit has decided this point in this way, but I think we could get the ninth circuit to go the other way." An attorney can give that advice in good conscience. But this is not in the interest of justice. Whether the twelfth circuit ultimately agrees with the ninth is not the point. The point is that the existence of the two circuits is an invitation to a greater caseload, and I think an introduction of a further uncertainty in the law as it is applied within California.

Therefore, it seems to me there is a strong affirmative thrust for keeping California within one circuit.

Now, let me answer some of the questions that have been raised about that and some of the objections.

It is said that California naturally falls into two parts. I think that, in a geographical sense, that is so. Of course, there is a good deal of chauvinism between north and south in California, but it is largely in a jocular vein, I think. The State is an integral unit. It is tied together, if by nothing else, by the transportation of the surplus water from northern California to southern California. It is tied tight together by its university system, by a number of institutions within the State and, of course, by the institutions of government.

Of course, in the past when the suggestion has been made that the State be divided in two there has been a substantial public outcry against it. So I don't think it is accurate to say that California naturally falls into two parts.

Next it is said that the caseload in California, if California were a single circuit of its own, would be so heavy that a nine-judge court would not be able to serve the need; and therefore, that California should not be a single circuit, let alone combining it with another State or States to make a new circuit. That answer, of course, is irrelevant unless one accepts the premise that a nine-judge court is "the optimum

maximum," if you will excuse that phrase. One can see that, on the general principle that a small group can get more accomplished in a decisionmaking role than a large group, a nine person court, I should say, is more efficient or could be more efficient. But I think to say that that decides that California should not be a circuit of its own, or that California should be divided, places too much emphasis on the internal management of the judicial group in the circuit.

It is said also that a court meeting en banc is too large if the size exceeds nine. I think that argument falls on two grounds: One, that as has been held, I understand, in the second circuit, it is not necessary that all judges sitting en banc hear oral argument, but only that all consider the written briefs and record. Therefore the spectre of more than nine judges sitting in a single room is not necessarily a part of the notion that too large a number would be sitting en banc.

Second, I think that, if the en banc situation is something that is important from the standpoint of being a part of the judicial process of each circuit, the way to cure that is to adopt some procedure by which less than all of the active circuit court judges must necessarily participate.

MR. WESTPHAL. If I may interrupt, what alternative or method would you suggest, assuming for example a bench of just 15, as to a method by which you could constitute a lesser number than the en banc court for—

MR. ABEL. Here let me say I am reacting only to that as an individual and not on behalf of the State bar, but it would seem quite appropriate to me to say that the seven senior judges within the circuit would be those who would sit en banc and their opinion would have the same effect as an en banc decision.

MR. WESTPHAL. Don't you think the junior judges would have rather strong feelings about that? They would be bound by an en banc decision, which sets the law of the circuit, and yet they would have no input into making that law?

MR. ABEL. Well, I think that—

MR. WESTPHAL. That seven-judge panel could in fact represent a minority of the 15-judge court.

MR. ABEL. That argument is one, of course, that can be made. I think, of course, it is only one possibility. It could be that the entire panel of judges in the circuit, instead of picking the seniors, would elect their own judges to sit en banc.

My point is simply that it doesn't seem to me a final answer to say that 15 judges are too many to sit en banc. I think that can be wrestled with. Then, of course, it is also true, I think, that if you make the en banc picture a vital turning point in the determination of how you divide the circuit, you allow the tail to wag the dog.

MR. WESTPHAL. Well, I think that is a very serious matter of concern. As I understand some of the testimony given before the so-called Hruska Commission at the hearings that were held along the west coast—as well as conversations I have had at several Ninth Circuit conferences—there has been a feeling that the Ninth Circuit, for whatever reasons, has not held enough en banc hearings in order to resolve what counsel are contending are intracircuit conflicts in decisions between several three-judge panels. Are you aware of this criticism that members of the trial bar have been making?

Mr. DREIFUS. May I comment on that?

Mr. WESTPHAL. Please do.

Mr. DREIFUS. After that comment was heard, a number of en banc hearings were scheduled and held. I know personally of several held in the past few months. I know Judge Duniway mentioned that a number were held this past year.

May I also address a remark to this question of less than the whole number of active circuit members being designated by statute to be the en banc court for purposes of making decisions which have en banc effect as precedents. The fact that one small group of judges out of a larger number are designated by statute in any judicial system to make a decision binding upon a much larger number is a fact that we live with every day. In one sense, for example, the Supreme Court, when it overrules the settled decisions of the circuits, is in effect overruling decisions by over 100 judges. So you have a superior body empowered to make the law for the inferior body. The one trouble is probably the tradition that circuit judges have always been at one level; we have never had a situation where, in our circuit courts of appeals, a judge has been both sitting at one level and also had the power to sit at another. We did have that, traditionally, at one time, when a Supreme Court Justice could sit in the circuit court of appeals. I believe that was true when they were first created.

This is not an insurmountable theoretical problem. It is more a human type of problem.

Mr. WESTPHAL. I will accept, Mr. Dreifus, your argument that the Supreme Court in its wisdom may overrule a legal decision that has, in fact, been held by perhaps 10 circuits. When the Supreme Court decides in favor of the 11th circuit which has expressed a contrary opinion, however, it does so by virtue of its constitutional authority to do so. It is "supreme." But when you are dealing, for example, with a bench of 15 circuit judges, those 15 are equals, and, as you have suggested, you can easily run into legal, theoretical, philosophical, and personal problems. I think they are problems that the Congress is necessarily going to have to consider as it evaluates the en banc function of a court of appeals as part of this overall problem that we are discussing in this series of hearings.

Mr. DREIFUS. Yes, I would like to point out that, in a de facto sense, this type of institution already exists in the way in which section 46 of title 28 operates. There, a circuit court sits with its panels filled with quite a number of visiting judges and district judges; thus its strength in total is greater than its strength in circuit judges. The circuit en banc consists only of certain judges.

Mr. WESTPHAL. Isn't this, in turn, one of the things that many members of the California bar have objected to, this practice of having at least one district judge on every three-judge panel in the ninth circuit?

Mr. DREIFUS. I believe the objection of the bar is more to the lack of certainty and stability, to the extent which that has on getting a precedent that can be followed. I think the example we gave in our statement of the California Supreme Court is apt. There you have a seven-judge court which has the time to control any possible conflicts among the many California lower courts. The way the circuits operate, and the way the Supreme Court is now organized, unfortunately, the Supreme Court does not have the time to do that with regard to panels of the circuits.

Mr. WESTPHAL. I think we have both interrupted Mr. Abel.

Mr. ABEL. I didn't feel that I had been interrupted, but I do have a few additional comments.

I think the arguments that Judge Duniway refers to about the burdens of travel are very understandable, and I think they undoubtedly do make the performance of a court of appeals judge much more difficult than if the circuits were less widely dispersed. But let me point out that the Commission proposal puts Alaska, Hawaii, and Guam in the new ninth circuit and that travel, therefore, is just as Guam, and the twelfth circuit consisted of Washington, Oregon, great within the new ninth circuit as it is with the old. If, however, the new ninth circuit consisted of California, Arizona, Hawaii, and Idaho, Montana, Nevada, and Alaska, at least the burdens of travel would be spread between the two circuits.

Now, we have not felt it would be appropriate for the California State Bar to suggest a circuit. Our main point is that we see serious defects, not in the public interest, involved in dividing California between two circuits. However, simply looking at the filings, and assuming that you are not limited to nine judges per circuit, a circuit consisting of California, Arizona, Hawaii, and Guam could be served by a panel of perhaps 12 judges. Now, as I say, the State bar has not taken a position on that, but only that California should not be divided. But a mere look at the filings tells that such a circuit would not be of unmanageable size.

I think that concludes my direct statement. Mr. Dreifus may have some additional comments.

Mr. DREIFUS. Yes, I do. I believe the central and important concern we have is the great change in the nature of the case law which is now preoccupying the courts—the Federal courts particularly. It is not just a case of the Federal courts deciding Federal cases and then, in diversity of citizenship cases, deciding matters of State law.

A look at the Federal Supplement and the Federal Reporter in the last couple of years—comparing just in pages of opinions and numbers of headnotes, the kind of decisions and the kinds of cases that are occupying the courts now as compared with 20, 30, or 40 years ago—reveals that there has been a tremendous expansion, in many areas of governmental administration and everyday transactions of every kind. It is this situation to which we address ourselves. I wish to make it very clear that neither I, nor the State bar, are commenting one way or another on whether this is a good or bad development. The State and the State institutions really have become a partner, if you will, of the Federal Government in carrying out combined State and Federal programs.

It tends to emasculate the State of California as a viable entity to say that the judicial structure shall not be coincident with the State itself. That is very important, because I believe we have to face the fact that the Court of Appeals in many aspects of Federal law—and strict questions of unconstitutionality are not the whole story—in many aspects of the kinds of cases which now seem to be routine, the Court of Appeals is really the court of last resort. The Supreme Court, with the tremendous area of jurisdiction that it has over all of the 50 State courts, the case law of the circuits and other courts, simply takes very few cases. As I say, these are not just constitutional cases, cases chal-

lenging the constitutionality of statutes; they are simply mundane interpretations of regulations that fill up volumes of the Federal Register, some of which are an inch thick. I don't know exactly how many cases have recently gone up on the subject of interpretation of welfare regulations, but there have been a great many of them.

Mr. WESTPHAL. Will you yield for a question at that point, Mr. Dreifus?

Mr. DREIFUS. Yes.

Mr. WESTPHAL. Let's assume you represent among your clientele a corporation engaged in the manufacturing business and it has one plant in San Diego and another plant in Fresno. That manufacturer is subject to the OSHA regulations on occupational health and safety. Today it would be possible to have a decision in the Federal court in San Diego applying those OSHA regulations to the operation of your client in San Diego and to have a different interpretation or decision in the Federal court in Fresno, applying to the same manufacturer, and to substantially the same type of a physical plant and piece of machinery. You do concede that is possible, do you not?

Mr. DREIFUS. Yes.

Mr. WESTPHAL. Now, today, you would resolve that conflict by appealing both of those decisions to the Ninth Circuit Court of Appeals, would you not?

Mr. DREIFUS. That is true.

Mr. WESTPHAL. Under the recommendation of the Hruska Commission for the creation of a new twelfth circuit and realignment of what is left into the ninth circuit, those two decisions would be in different circuits, would they not?

Mr. DREIFUS. That is true.

Mr. WESTPHAL. Assuming the same kind of conflict in the decisions, in the interpretation and application of an OSHA regulation, you would appeal the southern district decision to the new twelfth circuit and the decision from the eastern division, Fresno, to the new ninth circuit, would you not?

Mr. DREIFUS. That is true.

Mr. WESTPHAL. Conceivably each of those two circuits could affirm, and you would have a conflict, not only between the two circuits, but a conflict for your client who is manufacturing and engaging in business for both of the circuits.

Mr. DREIFUS. Yes, sir, that is true.

Mr. WESTPHAL. Under the existing procedure your only recourse would be to appeal those decisions to the U.S. Supreme Court, and you would have to proceed by certiorari, claiming a conflict of opinion between the several circuits, would you not?

Mr. DREIFUS. That is right.

Mr. WESTPHAL. So that really, in this hypothetical situation that I have just created, what becomes important for your client, the manufacturer, and important to you as his attorney is that you have a means of resolving the conflict, not so much between the two circuits, but between the southern district and the eastern district where that conflict originated. Isn't that true?

Mr. DREIFUS. Yes; that is true.

MR. WESTPHAL. So that fundamental to a question of realignment, as it affects the practice of law and the doing of business in the State of California, is the idea that the Congress provide a mechanism through which such a conflict can be resolved, preferably at the first appellate level beyond the southern and eastern districts, rather than at the highest level here in Washington in the Supreme Court, where you can only be heard if that court grants a writ of certiorari. Isn't that what we are really talking about?

MR. DREIFUS. Yes, sir.

MR. WESTPHAL. That is the real concern of the practicing lawyers in California if the State of California were split between two different circuits, isn't it?

MR. DREIFUS. Sir, there is a little more to it than that. I don't practice in the OSHA area, but my understanding is that in California OSHA is administered by a statewide organization. Even if you had the jurisdictional and procedural machinery that you have described, you would still be faced with this result: You would have a decision which is precedent in one circuit in California but not necessarily precedent in the other circuit.

MR. WESTPHAL. All right.

MR. DREIFUS. Then, while one client may be bound as a matter of estoppel or res judicata on this issue, you would have confusion because you would have a rule applicable in two districts of the State which is not necessarily applicable to other employers and not necessarily going to be carried out by the administrative people who have carried it out in the other two districts.

MR. WESTPHAL. What you are suggesting is that, in addition to having a mechanism for the resolution of a conflict, that mechanism must also include a precedent setting procedure so that the conflict which is resolved will be a precedent that any one of the four district courts in the State of California will have to follow?

MR. DREIFUS. Yes, sir.

MR. ABEL. If I may interject here, just in that context, you could carry that scenario one step further. Assume that there is this OSHA decision in the southern district. Let's assume now that the State has been divided into two circuits and the same question arises in the northern district. The question is: Does the litigant appeal in the northern district, knowing that the appeal that has come out of the southern district to the new twelfth circuit has come out in a certain way? The answer is, I think, that almost inevitably the party affected in the northern district, even knowing that the appeal coming up in the twelfth circuit from the southern district has gone one way, may have the hope and the expectation that he can somehow persuade the court of appeals in the new ninth circuit to go the other way. In other words—and I want to make this point again—dividing the State for this purpose is very likely to increase the caseload as well as the uncertainty in the minds of the public as to what the law is.

MR. WESTPHAL. If Mr. Dreifus, I were not only able to resolve the conflict in the first two cases, but also able to make that resolution of the conflict a binding precedent on all four of the California district courts, then your problem would not exist?

MR. ABEL. That is true.

Mr. WESTPHAL. This statement which has been received in the record, reflecting the official views of the organized State Bar of California, was a statement that was developed by that bar in May 1974. I take it that this was during the period of time that your predecessor, Mr. Seth Hufstedler was president of the State bar?

Mr. ABEL. That is correct. I was a member of the board at that time.

Mr. WESTPHAL. Now, I had the opportunity to read that statement shortly after it was first issued and to discuss it with Mr. Hufstedler, and I recall at that time that I was kind of chiding Mr. Hufstedler that, while the State bar had done an excellent job of stating its opposition to the recommendations of the Hruska Commission, it had really not come forward with any viable alternative which it would have the Congress consider.

Now, in your testimony here today—and I take it you offer it only as your personal suggestion and not as an official suggestion of the State bar—you have stated that you feel that a circuit composed of California as an entity, Arizona, Hawaii, and Guam, with approximately 12 judges is a viable alternative to that suggested by the Hruska Commission?

Mr. ABEL. That is correct.

Mr. WESTPHAL. What reaction do you think such a change would draw from members of the Nevada Bar, who would then be in the other circuit? The principal place for holding court, I assume would either be Portland or Seattle. I wonder what reaction we'd draw if a Las Vegas lawyer or a Reno lawyer had to travel to Portland or Seattle rather than San Francisco? Is your suggestion a viable one taking into account that problem?

Mr. ABEL. Of course, that would be a negative to that possibility. However, without knowing the number of filings out of Las Vegas, I would be loath to say that that would be a crucial factor. Someone's ox has to be gored by any change of circumstances.

Mr. WESTPHAL. I think that is a pretty good way of characterizing the problem that both the Hruska Commission and Congress is going to have to face here. It will be a question of selecting the ox and determining just how badly you are going to gore it.

In 1974, 125 appeals to the ninth circuit originated from the State of Nevada. If we are looking for a small level of appeals as the critical factor in determining which ox we are going to select, then we would have to look at Hawaii, Montana, Idaho, and Alaska and say, "since their ox is smaller than any other ox, we will select them for the goring." That doesn't seem to be a particularly satisfying way of arriving at a solution to a real tough problem.

Mr. ABEL. Of course, I personally tend to sympathize with the underdog. That may sound a little odd coming from a Californian, but the fact is that I think some attention should be given to the needs of States with the smaller number of filings, perhaps by making it easier for them to enable litigants to travel to court at Government expense. Now, Judge Duniway has mentioned that the ninth circuit court considers it important to take the court where the litigants are. I think that is essentially a good idea, but I don't think it is the only solution, and perhaps some attention by Congress to the possibility of bringing the litigants to the court of appeals would be appropriate. That would involve machinery, of course, but again it would be a matter of weigh-

ing in the balance on the one hand the efficiency of the operation of the court and on the other the advantage to the litigants to have the court come to them.

Senator BURDICK. What do you think the State Bar of Montana would say about taking all their cases to California?

Mr. ABEL. Well, I have never known of anyone who didn't like to come to San Francisco, Mr. Chairman.

Senator BURDICK. I think you would have some real opposition to that.

Mr. WESTPHAL. Let me pose another question, Mr. Abel.

If one were to look at a map—and if one were given a free license to do whatever type of gerrymandering he might want to do—looking at the statistics that are involved, one could come up with the possibility of taking the State of Arizona with its 260 filings and aligning it into the tenth circuit in which it would have more geographical congruity with its new States than it now has under some of the suggested gerrymandered alternatives for the ninth circuit.

What views do you have about the possibility of Arizona being detached from the ninth circuit and aligned with the tenth circuit?

Mr. ABEL. Well, I speak very hesitantly about Arizona. I suppose one problem would be the question of what, then, would be the law of the circuit as applied to Arizona after it became a part of the tenth circuit. That is to say, would decisions of the ninth circuit, antedating the date of the transfer, be binding on the district courts of Arizona, or would decisions of the tenth circuit, antedating the transfer, be binding? I don't know what the resolution of that is. Perhaps Mr. Dreifus has a comment on that.

Mr. WESTPHAL. Assuming that to the extent that those two circuits are applying Federal law, they apply that Federal law differently, and assuming that the U.S. Supreme Court has not attempted to resolve that intercircuit conflict where does that leave an Arizona lawyer and his client? Of course, without making a study, one would not know how many instances there would be in which an Arizona lawyer would be confronted with the possibility that the law of the tenth circuit is different from the law of the ninth circuit with respect to any one single issue of Federal law. But the advantage of moving Arizona is that then, if California is to be kept in part as an entity, one could adhere Nevada to it and you wouldn't have this problem that I posed briefly with respect to the Nevada people. One could align, for example, a State like Hawaii with 55 appeals to California and that might well be better statistically than aligning a State like Arizona with some 260 appeals. It may well be true that we are really talking about oxen being gored, but there are an infinite number of factors Congress will have to consider in trying to resolve the problems that are presented to it.

Mr. ABEL. Of course, the fact is that looking at it from the standpoint of total number of filings in the circuit, the number would be less in the new ninth circuit, and therefore, more manageable, if Arizona were allocated to the tenth circuit and Nevada retained in the ninth, simply because the Arizona filings have historically been much greater in number than those of Nevada.

I am not used to dealing in sweeping geographical alignments of this sort. You will have to excuse me if I have only the most tentative views about such matters.

Mr. WESTPHAL. I don't think the Congress is used to it either. It hasn't been done since 1927.

Senator BURDICK. I was talking to some railroad people about freight rates. They said that once you change the rate in one particular area it is like a tablecloth when you pull one corner; you wrinkle the whole tablecloth.

Mr. DREIFUS. I don't know about the other States, but I have recently had some contact with a lawyer in Guam. They have a commendable court system, and I have discovered that they have copied it from California. Such a similarity of State law might also be a factor that would be taken into account, as well as travel arrangements and other things of that nature.

Mr. WESTPHAL. I believe that is all the questions I have, Mr. Chairman.

Senator BURDICK. Thank you.

We will be in recess until 10 o'clock tomorrow morning.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned, to reconvene on Wednesday, October 2, 1974, at 10 a.m.]

CIRCUIT REALIGNMENT

WEDNESDAY, OCTOBER 2, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 o'clock a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. This is the fifth day of hearings on geographical realignments. We are dealing this week with the ninth circuit.

Our first witness this morning will be my colleague, the Honorable Paul Fannin.

STATEMENT OF HON. PAUL J. FANNIN, A UNITED STATES SENATOR FROM THE STATE OF ARIZONA

Senator FANNIN. Thank you, Mr. Chairman, for this opportunity of appearing before the subcommittee this morning on behalf of my State of Arizona. I asked to appear before you because of various proposals relating to the realignment of the ninth circuit as it affects Arizona. Mr. Stanley G. Feldman, President of the State Bar of Arizona, submitted a letter resolution to me which I would like to place in the record.

Senator BURDICK. It will be received, without objection.

[Copy of letter referred to follows:]

STATE BAR OF ARIZONA,
OFFICE OF THE PRESIDENT, STANLEY G. FELDMAN,
Phoenix, Ariz., September 13, 1974.

Hon. PAUL FANNIN,
U.S. Senate,
Washington, D.C.

DEAR SIR: I understand that a Senate subcommittee will soon hold hearings regarding the various proposals to divide the Ninth Circuit.

The Board of Governors of the State Bar of Arizona has discussed these proposals and has asked me to convey to you the opposition of the Arizona Bar to any proposal which would have the effect of putting Arizona and California in different circuits.

Our opposition is based upon legal tradition and history and, more importantly, upon present day facts and circumstances. For instance, the great majority of Arizona commercial and legal business is transacted with California. Recent surveys have shown that traffic between Arizona and California exceeds that between Arizona and any other state. In short, Arizona's legal, commercial and social ties are closer to California than to any other state. Lawyers and judges in both Arizona and California are used to considering these factors.

To put Arizona in a circuit with other states would be to put our people, our business community and our legal community in a position where they would have to deal with judges familiar with neither Arizona law nor with the commercial, legal and historical background of this region. The Board of Governors feels that this would be most disadvantageous, not only to the bar but to the entire commercial community.

I would appreciate your doing whatever you think appropriate to convey our position to the appropriate Senate subcommittees, and thank you in advance for any help which you can give us.

Yours truly,

STANLEY G. FELDMAN.

Senator FANNIN. In essence, the State Bar of Arizona is totally opposed to any proposal which would have the effect of putting Arizona and California in different circuits.

It is my understanding that there is a serious problem facing the ninth circuit. This circuit now handles more cases than any other except the fifth. On December 18, 1973, the Commission on Revision of the Federal Court Appellate System submitted its report. The Commission considered a number of proposals regarding the ninth circuit, with which you are familiar. The Commission recommended that the circuit be divided into two separate circuits, the ninth and a newly created twelfth. California would be divided in half with the southern and central districts being joined with Arizona and Nevada to constitute the new twelfth, and the northern and eastern districts of California would be incorporated with Alaska, Washington, Oregon, Idaho, Montana, Hawaii and Guam into a new ninth.

Chairman Burdick, on February 7, 1974, introduced Senate Bills 2988, 2989, and 2990 which contained the recommendation and alternatives offered by the Commission with respect to the ninth circuit.

The Commission also considered other proposals. One sponsored by Judge Kilkenny would have the effect of dividing the present ninth circuit into two divisions, northern and southern. The southern division would consist of the central and southern districts of California and Arizona. The northern division would contain the remainder of the present ninth circuit. Another proposal would leave the ninth circuit as is and merely increase the number of authorized judges.

Each of these three proposals has its adherents and I suppose Arizona could live with any one of them. However, a fourth proposal considered by the Commission would realign the ninth circuit as follows: California, Nevada, Hawaii, and Guam would constitute one circuit; Arizona would be shifted to the tenth; and a separate circuit would be created consisting of Alaska, Washington, Oregon, Idaho, and Montana. The Commission rejected this plan as totally unworkable.

The Commission reported that California by itself generates two-thirds of the caseload of the present ninth circuit. Of 2,316 filings in the ninth circuit in fiscal 1973, California accounted for 1,543. On the other hand, Arizona filings in the ninth circuit in 1973 constituted 234 cases, or approximately 10 percent of the total. Splitting Arizona off from California would not resolve the problem. The Commission in rejecting the proposal to place Arizona in the tenth circuit states as follows, and I quote:

... To shift Arizona into the Tenth Circuit would violate the principle of marginal interference. It would involve moving a state into a different, existing circuit in the face of vigorous, reasoned objections concerning the impact of such a move. Relocation would take from the bench and bar at least some of the law now familiar to them. We have also heard extensively testimony about

the close economic, social and legal ties between Southern California and Arizona and the more limited nature of such ties between Arizona and the Tenth Circuit with its seat at Denver. Moreover, opposition to such a plan has come from California as well as Arizona. Finally, as we develop more fully below, a separate circuit for the five northwestern states does not appear justified or desirable at this time. . . .

Mr. Chairman, I am sure this subcommittee is aware that Arizona is both geographically and commercially bound to California. Many of our State statutes were adopted from California. Both logic and statistics should preclude Arizona from insertion into the tenth circuit.

Mr. Chairman, I appreciate very much this opportunity to present my views.

Senator BURDICK. Could I ask one or two questions?

Senator FANNIN. Yes, sir.

Senator BURDICK. In other words, Arizona would like to remain there?

Senator FANNIN. Yes.

Senator BURDICK. Do you realize what the workload is with all of California and Arizona—that we would have to have between 20 and 30 judges?

Senator FANNIN. Mr. Chairman, approximately 10 percent of the total caseload is from Arizona. So this, I don't think, would—

Senator BURDICK. I wonder why people from Arizona would oppose a union with southern California?

Senator FANNIN. Well, I don't think there would be the opposition to southern California that there would be to taking us out of the ninth circuit.

Senator BURDICK. Do you believe the bar would have less objection to a unit consisting of southern California and Arizona?

Senator FANNIN. My personal opinion would be that that would be less objectionable. Would that be another circuit?

Senator BURDICK. We would give one new circuit the "ninth circuit" name, but both new circuits together would be the old ninth circuit.

Senator FANNIN. Of course, I do feel, Mr. Chairman, that there would be less objection to that than to breaking Arizona away from California completely.

Senator BURDICK. There has been some testimony, which has suggested that you get your maximum from the judges at the number nine. As you increase judges from number nine on up you get less efficiency.

Senator FANNIN. I understand, Mr. Chairman, but the total caseload would just be increased by 10 percent if Arizona stays within the ninth circuit, and, of course, we are just across the border from California. The borders are together for many, many miles, and you do have both economically and otherwise a very close connection between Arizona and southern California.

Senator BURDICK. What you are trying to convey this morning is that your bar has indicated its belief that this is no way to improve the tenth circuit.

Senator FANNIN. That is correct, Mr. Chairman.

Senator BURDICK. I have read the letter from the State bar's president, Stanley Feldman. He says the board of governors had studied the proposals and so forth. Do you know if that has ever been ratified by a meeting of the State bar, or is this just the view of the board of governors?

Senator FANNIN. The board of governors, as I understand. I do know from my own personal observation that there seems to be agreement, and I have never known it to be expressed otherwise than with the position that the State bar takes.

Senator BURDICK. In other words, it doesn't mean that has been approved by the State bar itself?

Senator FANNIN. I do know from the information I have received that there is a consensus, I would say, for this.

Senator BURDICK. I see.

Thank you, Senator, very much.

Senator FANNIN. Thank you, Mr. Chairman.

Senator BURDICK. The next witness is Mr. Francis Kirkham, an attorney at law from San Francisco and a member of the Revision Commission. Mr. Kirkham, we are pleased to have you with us this morning. Please proceed to present your case in any manner you wish.

STATEMENT OF FRANCIS R. KIRKHAM, ATTORNEY AT LAW, SAN FRANCISCO, CALIF.

Mr. KIRKHAM. Thank you, Mr. Chairman. I am pleased to have the opportunity to appear at these hearings. While I cannot entirely divorce my comments from my experience for 40 years as a practitioner in the ninth circuit, I do feel that I should try to speak today as a member of the Commission, drawing upon the evidence which has been submitted to us.

As you know, Mr. Chairman, the Commission's recommendations were preceded by hearings held in four cities of the ninth circuit: Seattle, Portland, San Francisco, and Los Angeles. The most striking aspect of these hearings was the virtual unanimity of the witnesses in expressing serious dissatisfaction with the situation in the ninth circuit: others proposed circuit realignment; and the proponents of new are needed to solve the problems faced by the court. They disagreed, to be sure, on the nature of the most desirable structural changes. Some preferred creation of geographical divisions within the existing circuit; others proposed circuit realignment; and the proponents of new circuits differed as to where best to mark their boundaries. Since the publication of our report, the Board of Governors of the State Bar of California has adopted a report opposing new circuits which would divide California. It is unlikely that unanimity of views as to the best solution will ever be reached among the bench and bar of an area as vast and varied as that comprising the ninth circuit: from Alaska to Arizona, and from the islands of the Pacific to the Dakotas. But above all, it seems to me, the evidence before us demonstrates that we must not let a lack of unanimity as to the preferred solution result in a continuation of the status quo. Two local bar associations in California have already suggested that any change be postponed pending further study. This is a familiar gambit and, I submit, an intolerable suggestion in the light of the testimony received by the Commission. Let me, therefore, emphasize at the outset the need for a change before discussing the proposed solution.

The first hard unalterable fact is the caseload with which the circuit must deal. In fiscal 1973, 2,316 cases were filed. In fiscal 1974, as our executive director told this committee last week, this number increased to 2,695—an increase of more than 16 percent; three times the rate of growth for the country as a whole.

The most serious consequence of the present situation in the ninth circuit is delay in the disposition of cases, especially civil cases. In the summer of 1973 the Judicial Conference of the Ninth Circuit passed a resolution:

Resolved, That the Judicial Conference of the Ninth Circuit expresses its concern over the delay in disposition of civil appeals in the Circuit and urges the Commission for reform of the Federal Appellate Court system to complete its studies and recommendations with respect to the Ninth Circuit under the provisions of Public Law 92-489 at the earliest possible date.

At the Commission's hearings, witness after witness expressed concern over delays in the disposition of civil cases—delays often approaching or exceeding 2 years at the appellate level.

The Administrative Office reported that, as of June 30, 1974, there was a total of 291 cases under submission for more than 3 months in the country as a whole. More than 20 percent of these were in the ninth circuit. Further, of the total cases under submission for more than 9 months, over 40 percent were in the ninth circuit. These figures, of course, represent only the time litigants must wait for a decision after a case has been argued or submitted. The additional delay in the ninth circuit in civil cases between the filing of briefs and the calendaring of a case for argument or submission is also a matter of serious concern. One witness before the Commission pointed out that he had to wait a year and a half after the last brief was filed before his case was called for argument; that he virtually had to relearn the case because of the lapse of time. Indeed, the ninth circuit now sends out a form letter at the time counsel are advised that a case has been calendared for oral argument, inviting the parties to submit any "relevant decisions rendered since the filing of a party's last brief." It is not a happy circumstance that a case may have to be researched anew because of delays between briefing and argument.

Another problem related to the inordinate caseload, and also to the vast geographic extent, of the ninth circuit is the problem the court has had in trying—rather unsuccessfully according to the testimony before the Commission—to maintain a consistent law within the circuit. Only the other day I learned that two decisions by different panels of the court, one in Los Angeles and one in San Francisco, had come down within a matter of hours of each other, each in direct conflict with the other on the construction of an important Federal statute. Not one of the judges in either panel knew that a like case to the one he was considering had been briefed and argued and was under submission to another panel of the court. Needless to say, in these two cases the ninth circuit has granted one of its relatively rare *en banc* hearings.

Judge Duniway expressed yesterday before the subcommittee, far better than can I, how such a thing could happen—the pressures on the court and the resulting lack of any opportunity for the collegial consultation between members of the court which is essential to institutional unity and, indeed, to the very functioning of the judicial process itself.

I should add that members of the California bar, at our hearings, expressed concern at the "great variance" in the decisions of different panels, and the assistant U.S. attorney for the central district of California gave specific examples of apparently inconsistent decisions by different panels of the court, and expressed apprehension that cases were being decided "by the luck of the panel."

The Commission also learned that for two successive fiscal years, 1971 and 1972, there were no en banc adjudications in the ninth circuit. More recently, the court has accepted a number of cases for en banc determinations—these facts were brought out at our hearings—and appears to be doing so with increasing frequency. In fiscal 1974, for instance, the court gave en banc consideration to eight cases. In only five of these cases, however, did the en banc court hear oral argument. Attorneys have indicated dissatisfaction with a procedure under which en banc cases—usually matters of great importance or controversy—are decided without an opportunity for counsel to personally engage the attention of all the judges who will be deciding the case. Indeed, the distinguished chief judge of our circuit has expressed the view that “every en banc should have an en banc argument in open court. I think it really expedites things because it brings them to a focus.”

It is, I believe, somewhat questionable whether eight en bancs are sufficient to avoid the inconsistencies of decisions which have disturbed the bar. In the fifth circuit, where en bancs require the gathering of 15 judges, 33 en bancs were held in fiscal 1974, all but 4 of them with oral argument. It also remains to be seen whether the increased use of en bancs in our circuit further exacerbates the problems of delay to which I have referred.

The difficulties which the ninth circuit has had in maintaining a consistent law within the circuit undoubtedly stem in part from the extensive reliance which the court has been forced to place on the assistance of district and visiting judges. Unbelievable as it may sound, a total of 71 different judges sat on ninth circuit panels during fiscal 1973, the most recent period for which figures are available. During that year only 58 percent of the signed majority opinions issued by the ninth circuit were written by the active circuit judges: 27 percent, nearly a third, were written by district judges and judges visiting from other courts. No other circuit comes even close to that proportion—the next highest being 18 percent—while for the country as a whole the figure is only 12 percent. Even more striking, the signed majority opinions in the ninth circuit were written by a total of 61 different judges. This is twice the number of judges writing signed opinions of the court in any other circuit. With so many judges taking part in the decisionmaking processes—and so many judges writing opinions—it is hardly to be wondered that the court has had problems in keeping its decisions consistent. I recall to you Mr. Chairman, the statements of Judge Duniway about the difficulty these 61 judges who wrote opinions had in arranging for consultation with each other because of the geographic distance between their home stations.

To summarize, Mr. Chairman, no one disputes that the caseload now borne by the ninth circuit imposes a completely impossible burden on the 13 active circuit judges now provided for the circuit. No one disputes that 15 or more active judges are required to carry the caseload of the circuit. Actually, the number should be greater. If the number of judges were 18 today, each would have a caseload of 150 cases per year, which would be greater than the filings per judgeship in seven of the present circuits, and would approximate the national average of terminations per judgeship. No one disputes that, at the very least, difficult problems arise in maintaining institutional unity

on such a large court, extending over such a vast territory: in fact, the testimony before the Commission shows that serious problems do exist which can be solved only by creating smaller, more manageable circuits.

I want to emphasize, Mr. Chairman, that these delays and other problems are not the fault of our judges. The judges of the ninth circuit could not be more conscientious or hard working. The simple truth of the matter is that they have been put in an impossible bind by the failure of all of us to recognize the situation and do something about it: to provide them with a structure under which they can perform their duties as judges with a current docket. Instead, they find themselves in a situation where, without their fault, they are falling further and further behind as they try to deal with an impossible workload by borrowing excessively from overworked district judges, by reducing and eliminating oral argument, by deciding cases without written opinions, by delegating, as a practical matter, the screening of cases for summary treatment to nonjudicial personnel, and by relying more and more—of necessity—upon such personnel for the analysis of cases and the preparation of written opinions. In other words, Mr. Chairman, we are looking at a threatened breakdown in the judicial process itself. And I may add that we are doing this at a time in our country's history when, it seems to me, perhaps above every other public trust, the integrity of the judicial process in our national courts must be preserved.

What, then, is the solution?

There is little, if any, dissent from the view that the circuit must be divided, except for those who have suggested the alternative of two divisions. I cannot add to what Judge Duniway told the committee yesterday about the proposal for two divisions. As he pointed out, it would create what in effect would be two separate courts, but with the serious drawback of administrative problems enhanced by the dichotomy itself. To try to maintain institutional unity in a single large circuit is difficult enough, as is demonstrated by the experience of the ninth circuit and the fifth circuit with its 33 en banc hearings in 1 year, each calling for the convocation of 15 judges from 6 States. To maintain such unity in a circuit as large and dispersed as the ninth, with two divisions geographically separated and under semi-autonomous leadership would, as Judge Duniway put it, be an "administrative monstrosity."

If, then, the circuit must be divided, the only question is how?

A circuit composed of California alone would, for the first time, abandon the principle that circuit courts should be national in their composition. As the Report of the Special Committee on Coordination of Judicial Improvements of the American Bar Association put it:

After careful consideration, the committee believes that the principles of federalism and the advantages which flow from infusion of judges from several States into a circuit court considerably outweigh any disadvantages which might be generated if part of a State were placed in two or more circuits.

The Commission agrees with this statement.

But beyond this, such a circuit would immediately face the stark and inescapable fact that a court with the appellate caseload originating in California would start with an overloaded docket and soon find itself entangled in the same difficulties as now beset the

fifth and ninth circuits. After all, California is an empire of 21 million people—larger than any other State, and considerably larger than most of the countries in the world. Guam, Hawaii, Alaska, Washington, Oregon, Montana, Nevada, and Arizona contribute little more than one-third of the caseload of the ninth circuit. Notwithstanding their vast geographical expanse, stripped of California, they would constitute one of the smallest circuits in the country in volume of work.

Commonsense dictates the creation of two circuits which would divide the caseloads—and this is what the Commission recommends. The only significant opposition to this recommendation is from those persons who oppose “splitting” or “dividing” California.

In the first place, I believe the words “splitting” and “dividing” are misnomers. California already has four judicial districts, in each of which a single judge decides the law. No one has ever found anything in this situation which threatens the unity of the State, nor has anyone read into it any political overtones. To include the whole sovereign State of California in two Federal judicial circuits has no more of a divisive effect. The courts of appeals declare national law. Each at any time may have to discern in particular cases the law of any State. But the decision of the Federal court on that law is in no way binding upon the State courts. California is a sophisticated State with a fully developed jurisprudence. And, as Judge Duniway pointed out, in his long experience on the bench, both State and Federal, he has never seen an occasion when the several Federal courts in California have disagreed on the meaning of State law. Here again, without needless repetition, I can do no better than to endorse Judge Duniway’s analysis of the problems from the vantage point of his many years of distinguished service on both the court of appeals and the appellate courts of the State of California. That testimony appears in his statement that was submitted to the committee yesterday. I might, however, add two thoughts:

In the first place, I find it disturbing to have the State Bar of California concerned that litigants will shop in two circuits to obtain conflicting judgments on the application of the national law to State activities. The problem here, of course, Mr. Chairman, is not the existence of two circuits in California, but the possibility of a conflict between circuits which will impose different rules of national law upon citizens of the United States who happen to live in different parts of California. In my judgment, a conflict in national law is equally intolerable, whether it be between two circuits in one State or two circuits in distant States.

There is no doubt that conflicts do exist. There is no doubt—any more—that the Supreme Court tolerates these conflicts, sometimes for long periods of time. As one member of this Commission, I am firmly of the view that a means of resolving such conflicts must be devised. Statutes imposing different obligations or creating different rights for particular citizens or communities would suffer a quick death under the equal protection clause. Any rational system of jurisprudence must provide the same result with respect to the adjudication of courts. I have never been persuaded by the view expressed by some writers and held, I fear, by some members of the Supreme Court, that conflicts should be allowed to “simmer” in the circuits until the experience of those who suffer under discriminatory rules of law “illumines” for

the Supreme Court the path it should take. Our duty is to recommend a way to eliminate, promptly and forthwith, all conflicts in the national law. This, I think, would resolve any substantial problem that is presented to us by the State bar.

In the second place, I feel it only fair to point out that while the Board of Governors of the State Bar of California properly speaks for the integrated bar, no plebiscite was conducted, and there are, of course, many who do not share the views stated in the board's report. For example, the American College of Trial Lawyers surveyed its members in California and of those who responded, a majority favored the Commission's recommendation. The sample was not large enough to be used as representative of any universe, but it does disclose the views of a group of lawyers particularly experienced in litigation.

I cannot close without saying that I, too, have had the same qualms as others at the thought of what may be called "dividing" California. But reason tells me that these qualms, like the feelings of my good friends on the board of governors of the State bar, are more emotional than substantive.

I believe there is no reasonable alternative to the division recommended by the Commission. If you will forgive me, Mr. Chairman, I would like to interpolate to recall to you one of the most impressive experiences I have had. About 10 years ago, I sat at Lakeside, Bohemian Grove, north of San Francisco, and heard Mr. Wernher von Braun tell us how President Kennedy's promise to put a rocket on the moon by 1970 was going to be accomplished. He said we would take a rocket and put some men in it and shoot it up to the moon and orbit the moon, and then another smaller rocket attached to that mother ship would disengage itself and float down to the surface of the moon, the men would get out and explore the surface, get back in, blast off from the moon, reunite with the mother rocket and they would all come safely back to earth.

So prestigious was Mr. von Braun—as the chairman well knows—and so impressive in his knowledge and so articulate in what he said that we nearly believed him.

But the interesting thing he said at the end of his talk was this. He said many people are complaining about expenses and why do we go to all this trouble to make all of these changes. He said it reminded him of the little old lady who said, "Why do we go to all this trouble, why don't we just stay home and look at television as the good Lord intended."

There are times when inaction is a course which bears greater risk than action. At some point it becomes essential for the bar, for informed citizens and for the Congress to examine the implications of allowing the present situation to continue without the relief which circuit realignment, coupled with new judgeships, can afford. It is not hard to find objections to any proposal which may emerge; but such an attitude little serves the needs of a judicial system already beset with grave difficulties—a system which, in the interest of the country, must operate with efficiency, yet without sacrificing either fairness or the essential characteristics of the courts of appeals as national institutions.

Senator BURDICK. Thank you very much for your very excellent statement. You have been very helpful to the committee.

I am impressed with that one sentence on the last page of your prepared statement: "There is, I submit, no reasonable alternative to the division recommended by the Commission." When it comes to providing a viable alternative to the new circuits, I have yet to hear one suggested by those who oppose new circuits. The only alternative I have heard is, "create more judges." Right now the circuit needs 20 new judges. When you consider en banc hearings using 20 judges—counting up the traveltime and the days required to sit and hear these arguments—why you have used up much of your new judge time right there.

The testimony has been quite clear up to this date that when you get past nine you are getting diminishing returns. I am impressed with your statement because I haven't heard a viable alternative yet, have you?

MR. KIRKHAM. No; I have not. I approached the division of California with just as much instinctive feeling as I am sure every member of the Board of Governors did, but when you look at the matter there is no other way, and when you examine the supposed problems raised by our suggestions, those problems really disappear as far as any substance is concerned.

SENATOR BURDICK. I can understand California not wanting to give up the one-State approach. I understand that from an emotional point of view. But the alternative, as you point out, is bigger case-loads and bigger backlogs than we have now, and the more judges we appoint the less work we will turn out per judge.

MR. KIRKHAM. Actually, there is no division of California. To place parts of California in separate judicial circuits is really no more divisive than to place them in separate judicial districts. The solution is a means for resolving any conflict just as you have a means for resolving conflicts if they occur by appeal from the district court decisions. It is quite possible, for instance, even in such a social matter as the annual meetings of the judicial conference, to have a joint meeting, as the eighth and tenth have now.

SENATOR BURDICK. Do you see any conflict between these two new circuits and any other circuits?

MR. KIRKHAM. No, I don't.

SENATOR BURDICK. The Supreme Court must resolve such conflicts?

MR. KIRKHAM. A conflict between judicial districts in California is no more disturbing than a conflict between a citizen of California and a citizen of Utah. It must be taken care of if a rational system of justice is to be applied.

SENATOR BURDICK. Does staff have any questions?

MR. WESTPHAL. Yes, Mr. Chairman. Mr. Kirkham, in your response to one of Senator Burdick's questions, I believe you referred to the fact that each of these bills now before the subcommittee would add an express provision to section 1254 of title 28, which stipulates the methods by which cases in the courts of appeals may be reviewed by the U.S. Supreme Court. That provision, which is set forth in section 7 of each of these bills, reads as follows:

(4) By appeal, where is drawn in question, the validity of a State statute or of an administrative order of statewide application on the ground of its being repugnant to the Constitution, treaties, or laws of the United States: *Provided, however,* That this subsection shall apply only when the court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States.

Now, you have studied that language, haven't you, Mr. Kirkham?
 Mr. KIRKHAM. I have read it, yes.

Mr. WESTPHAL. Do you think that language, creating an appeal in an instance where there would be a conflict between the proposed new ninth circuit and the proposed new twelfth circuit concerning the validity of an order of the State of California, would be sufficient to insure that the Supreme Court would resolve the conflict by taking jurisdiction of the case? The Congress really forces it to take jurisdiction, doesn't it?

Mr. KIRKHAM. Yes; I am satisfied that that is so.

Mr. WESTPHAL. Of course, apart from putting that burden on the Supreme Court, I suppose there are other ways in which that specific problem—which Judge Duniway has never seen in his years of experience and suggests would only occur rarely—could be resolved?

Mr. KIRKHAM. I was about to say that I don't consider it a burden, because I don't anticipate it will happen. If it does, it will be so rare it will be no real burden to the court. This is not just a problem for two parts of California; it is a problem for the whole Federal system of jurisprudence.

As far as the broader problem is concerned, there are—and perhaps there must be as a matter of sheer necessity, because of the Supreme Court's docket—some other methods devised for resolving conflicts. Those conflicts are not conflicts that should concern the Supreme Court. I can give you an example. In one of our cases in the ninth circuit, the court recently held that where a district court enters judgment against a defendant for attorney's fees, as in the *Perkins* case, and that is appealed and the court of appeals holds the judgment excessive and fixes a lower amount, then the defendant must pay interest on the lower amount from the date the district judge entered his order. The third district, I think—I have given a citation to Mr. Levin—has held exactly the opposite. In one circuit, parties are paying interest on a judgment, and in another circuit parties are not paying interest. This is not a problem that should concern the Supreme Court of the United States. Those justices shouldn't have to get together and concern themselves with that, but it is important that that conflict of law be resolved so that every citizen in the United States will be operating under the same law. It involves a construction of the antitrust laws.

Mr. WESTPHAL. On that point, let me just mention, that, under Senator Burdick's chairmanship, this subcommittee has, over the last 4 years, followed a course, chartered by the chairman of the subcommittee, of reviewing the structure, procedures and operation of the Federal judicial system. We started with the magistrate system, trying to make that as effective as it could be under the Magistrates Act. We then moved on to extensive oversight hearings in connection with the requests for more district judgeships. The subcommittee examined, in hearings and in staff studies, the operations of approximately 62 of the 94 judicial districts, and, earlier this year, held 4 days of hearings on the judgeship needs of, and the operating procedures employed in, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals. In this series of hearings now being held the subcommittee has been looking into the Fifth and the Ninth Circuit Courts of Appeals. The logical progression, we hope, is that

once decisions have been made concerning the lower Federal courts—the district and circuit courts—then perhaps that would be the best time for Congress to look into the reports and recommendations that have been made by the Freund Committee, the Advisory Council on Appellate Justice, the American Bar Association, and other groups with reference to how the Supreme Court is to be given help—if indeed it needs help—in resolving conflicts with reference to the national law.

Do you find any objection to that timetable?

MR. KIRKHAM. No; none whatsoever. It is a serious problem and deserves very careful study. The reaction to the Freund Committee report is an example. Here are very distinguished scholars. We all know how distinguished, and how thoroughly familiar with the workings of the Supreme Court and the Federal courts, they are, but without background study and without enough of a realization of a rather fundamental flaw in the recommendation, they made their recommendation. Now, much of what they say is, of course, obviously true, and much of what they say must be remedied; that is certain. But they haven't given much consideration, I think, to the full ramifications, and I hope the reaction to one aspect of that report—namely, depriving the Supreme Court of the right to review every case—doesn't bear upon the merit of the whole report.

MR. WESTPHAL. Mr. Kirkham, I assume that, out of a sense of modesty, you have omitted from your testimony before this committee any personal background other than the fact that you have been a practitioner for some 40 years. I think you may have mentioned in an aside earlier this morning the fact that you had the opportunity of clerking for one of the justices of the Supreme Court, but I think it would add to our record this morning if you would tell us something more about your personal background and experiences in the field of law. Would you do that, please?

MR. KIRKHAM. Well, I did serve as law clerk to Chief Justice Hughes, and thereafter—partly during that time and thereafter, Mr. Robertson and I wrote a book on the jurisdiction of the Supreme Court of the United States, which is in its second edition and which, I am told, is still the authoritative text on that subject. Since that time I have practiced law as an active practitioner, spending much of my time in the courts; served for 10 years as general counsel for Standard Oil of California; served on numerous committees of the State bar, including the Committee on the Administration of State Justice that Judge Duniway referred to yesterday; served on the Research Committee of the American Bar Foundation; been the chairman of the Anti-Trust Section of the American Bar Association; and have tried to, in the course of my practice, accept such public positions in connection with the problems of the judiciary and of the law as have come to me. I think that about states it.

MR. WESTPHAL. I would be interested in knowing in how many of those approximately 40 years you have been engaged in trial work at the district court level?

MR. KIRKHAM. Well, it is hard to say how many years. I tried quite a number of cases, mostly in the antitrust field—large cases—and some cases involving—well, the case involving the Standard Oil trademark. I have had perhaps even more experience in the appellate courts, arguing cases in the U.S. Supreme Court and in the circuit courts—not only the ninth circuit, but the tenth, fifth, eighth, and others.

Mr. WESTPHAL. Could you give us a rough estimate of the number of cases in which you have appeared and argued in the courts of appeals for the various Federal circuits?

Mr. KIRKHAM. Well, it would be hard to do that. The first one was in the 1930's and the last one was a few months ago. There have been dozens, I am sure, dozens.

Mr. WESTPHAL. You are a senior partner in the firm of Pillsbury, Madison in San Francisco?

Mr. KIRKHAM. Pillsbury, Madison and Sutro.

Mr. WESTPHAL. To what extent have you had practice in the Supreme Court of the United States?

Mr. KIRKHAM. I think I have practiced more in the Supreme Court of the United States than in the State of California. I have only argued about eight cases in the Supreme Court, but I have participated in many, many others. I suppose I have been on 50 or more briefs to the Supreme Court.

Mr. WESTPHAL. So I take it that the views that you have presented to the subcommittee this morning are based, not only on your study of the report of the Commission on the Revision of the Federal Court Appellate System, but are also influenced by your own experience over a long number of years in practicing before many of these courts of appeals?

Mr. KIRKHAM. That inevitably is true, Mr. Westphal.

Mr. WESTPHAL. If you can mention the 1930's, then your experience began in the courts of appeals when they had no caseload problems and were able to give oral argument to every case and render their opinions with reasonable dispatch and has continued to the present day, when they are operating under vastly expanded workloads with an ever-increasing number of judges?

Mr. KIRKHAM. That is true. It so happens that in cases I personally have had in recent years in the courts of appeals I have not had the experience of having oral argument curtailed. In fact, it has been expanded. But I am very much disturbed by the tendency that has grown up, particularly in the Fifth and Ninth Circuit Courts of Appeals. It is correlated, absolutely, to the workload, and the often too ready answer to the problem is the reduction of oral argument. I don't think an oral argument is necessary in every case. We do have those cases—and I can go through the thousands of records of the Supreme Court and find numerous cases, particularly prisoner appeals—that are frivolous. But I do not think oral argument should be denied in any case where it is requested, because it can be curtailed the moment the lawyer stands before the court. I think that no matter what the case, the court should give an option to counsel to argue the case.

Senator BURDICK. Judge Duniway testified yesterday that these frivolous cases generally are in the criminal field, where there is an automatic appeal. I believe it is the practice in the fifth circuit that, where even one judge thinks oral argument is necessary, they grant it. Now, if you have a case where oral argument is not necessary, would you grant oral argument?

Mr. KIRKHAM. Yes, I would, because it is not going to take that much time of the court. Those cases can be docketed. There are notices sent out. There are many of these cases where argument won't be requested—because counsel won't go the distance to appear before the

court—but if they request oral argument, I think oral argument should be permitted. Judge Lombard, in the second circuit, has told us it takes no time—and this is true, it takes no time—for a judge to discern if there is anything of merit there. I believe that type of case should be dismissed, decided immediately from the bench, but I don't think any case should be denied oral argument where it is requested, and I don't think that any case, no matter how frivolous, should be decided without an opinion. Now, an opinion can mean two things. It can mean a written opinion prepared as a precedent and it can mean one sentence from the bench that tells why the court is summarily disposing of the case. I do not think it is an appropriate judicial process for a case to be set before the court and then to get a notice that there will be no oral argument and then a notice which says "affirmed" or "reversed". I don't think the right of an appeal in that situation—not as a matter of due process, perhaps, but as a matter of our best practice—has been accorded to every person from the first judgment. This doesn't mean that you have to have long opinions. Above everything, it doesn't mean every opinion must be printed by the West Publishing Co. to burden our shelves; it means there should be a statement, no matter how informal, as to the reasons why the case is disposed.

I have been distressed, for instance, to see the Supreme Court go back to the old practice it had before Chief Justice Hughes. Before that time, when an appeal was dismissed, they had a formal *per curiam* that said, "dismissed for lack of a substantial question," citing only cases that held that when a question was not substantial it went to the jurisdiction of the Court and it could be dismissed for want of a substantial Federal question. Under Chief Justice Hughes, those cases which had decided that matter prior to that time were cited in the *per curiam* so that the lawyer knew why his case was not substantial. All the Court does now is say "dismissed for lack of a substantial Federal question." I have seen cases in which, with all of my experience, I couldn't see why there was a lack of a substantial Federal question; it wouldn't have hurt the court to have cited the cases to tell me why.

Senator BURDICK. The question I am going to ask now is beyond the scope of this discussion, but you have prompted me to ask it.

One of the judges from the fifth circuit came before us the other day and referred to the English system. As you know, our common law is based upon the English system as it has been modified here, but it is still the common law.

Mr. KIRKHAM. That is right.

Senator BURDICK. I presume their present system is still based on their old common law, yet this fifth circuit judge testified that those judges over there handle 5 and 10 times the caseload that we do. How do they do it?

Mr. KIRKHAM. Well, I can't answer that. I wish my partner, Mr. Bates, were here. He just returned as one of the lawyers representing the American Bar on the study of the English courts. But I do know one thing they do not do; they don't brief cases there. They appear before the court with their cases. They argue those cases before the court. The court looks at those cases at that time. The assistants brings them in and stack them on the table. They go into the case and then the case is decided from the bench. It is decided with a statement of

the reasons why, and that is it. They don't go through the long folderol of printed briefs, submissions, and so on. The case is taken directly in and argued as the pleadings come before the court—as the case is before the court. They consult at the very time the case is before the courts. Maybe that is a better way—I don't know, but it performs the functions of the court.

Mr. WESTPHAL. I assume the English bar accepts it because that is the tradition and the procedure they have had for hundreds and hundreds of years.

Mr. KIRKHAM. That is right.

Mr. WESTPHAL. On the other hand, in the United States, the procedure has been one which fully employs the adversary proceeding both at the trial level and at the appellate level, by calling for the preparation of briefs by the appellant and by the respondent, and the matter is considered by the court on the printed record. That has been our custom. So it is a question of what the jurisprudence of the country has grown used to.

Mr. KIRKHAM. Has been accustomed to.

I favor the American system of filing briefs. I think they are helpful to both the court and counsel. I think it helps direct the lawyer better. One thing we must remember, of course, is that the English people are not as litigious as we are. Why California should be such a litigious state, I don't know. There are only half as many appeals in Texas as in California. In England they are not litigious. They say "*de minimis non curat lex*." The law won't concern itself with trifles. In this country we pass rules that provide for class actions so that everybody who has a dollar claim will appear in court. In England, too, you have a trained barrister. There is that screen between the solicitor and the court. So there are many fewer cases, and many fewer cases come to litigation. Also the court can award costs. The plaintiff goes on his appeal at his peril. When costs can be awarded against you, why—

Senator BURDICK. Even if there are fewer cases, it is a fact that the judges handle more cases.

Mr. KIRKHAM. That is right. They are presented with more ability. I am sure that is so, Senator.

Senator BURDICK. Well, I may take another trip to England and take a look at this system. I may just do that.

Mr. KIRKHAM. I wish you would. In your position, I can't think of anything that would be more helpful than for you to have the most complete knowledge concerning the judicial systems there and here. As Mr. Westphal says, they are the historical base of our judicial system, and a part of it.

Mr. WESTPHAL. Mr. Kirkham, along this same line, I take it that you do not dispute the fact that the so-called "law explosion" which set in following World War II has reached a point where the courts of this country, both State and Federal, have been forced to deal with a much larger caseload than we all knew back in the 1930's and early 1940's. For example, as Judge Duniway testified yesterday, when he first went on that bench as late as 1961, their filings per judge were only 49 and their terminations per judge were only 25. We are now talking in terms of 100 filings per judge being utopia, and we don't see how we can create enough judges on a court in order to get their

filings down to a figure of 100—let alone back to a caseload of 50 per judge. In those days, they wound up writing probably a total of 25 opinions a year, both full-blown signed opinions and per curiam opinions.

Mr. KIRKHAM. That is correct.

Mr. WESTPHAL. We will never see those days again.

Mr. KIRKHAM. No, we will not.

Mr. WESTPHAL. So the problem for Congress is really to see how it can so structure our appellate courts so that we will not expect our judges to deal with caseloads of 209, 189, or 169 per judge. We need to get down to the most manageable figure that we can.

Mr. KIRKHAM. That is correct.

Mr. WESTPHAL. Still, we have to reserve the opportunity for every litigant to have his rights determined in a court of law and to have at least one right of review by an appellate court. Is that basically the dimension of this problem?

Mr. KIRKHAM. That seems to me to be it exactly.

Mr. WESTPHAL. All right. Now, in that context, I would like to look at the recommendation of the Commission with reference to the proposed creation of a new twelfth circuit and the realignment of the other States into a new ninth circuit. The figures given by Professor Levin in his testimony a week ago showed that, with reference to the 12th circuit, one consisting of the southern half of California plus Arizona and Nevada, that court would have a total of some 1,545 filings. I think you were present in the hearing room yesterday when I asked Judge Duniway about this point. The testimony indicated that, if that new twelfth circuit had only nine judges, the caseload would be approximately 171 per judge. In order to get that caseload down below that figure that circuit would very likely need 10 or 11 judges. In order to get it as low as 129 you would need 12. Do you realize that?

Mr. KIRKHAM. I do.

Mr. WESTPHAL. Of course, all we are talking about there are the new filings coming into that court from those States each year. We have not asked how that court, with whatever number of judges, is going to whittle away on the backlog which it will inherit of some 2,300 cases. The committee exhibits show that that many cases were pending as of June 30, 1974, when the 1974 fiscal year terminated.

In your statement you have mentioned the percentage of cases that have been pending for decision for longer than 3 months and for longer than 9 months in the ninth circuit. Judge Duniway told us yesterday that as of, I believe, September 30 in the ninth circuit there were some 601 cases which had been fully briefed—where counsel had done all their work—which were just waiting for a time when the court could schedule them for oral argument.

Mr. KIRKHAM. And then they will be waiting for a decision after that.

Mr. WESTPHAL. And then you have to wait for a decision after that.

Now, then, the point of my question is, if this circuit is to be realigned—and also if the fifth circuit is going to be realigned, because they have somewhat the same problem, although they do not have as much of a backlog as the ninth circuit because of this extensive screening technique they have employed—how are we going to go about getting enough judge power, not only to handle the incoming caseload, but also to whittle away at this backlog?

Mr. KIRKHAM. Well, it seems to me, Mr. Westphal, that certain ideals have to be compromised as a practical matter. We have heard much testimony—and it is almost unanimous as far as the judges are concerned—that a court of nine is about as large as a court should be if it is to have the ideal collegial atmosphere which a court should have. I think that in this situation it is necessary to compromise that ideal to the extent of appointing enough judges to take care of the backlog and to take care of the workload. If this takes two more judges or three more judges, then it just has to be.

Now, the compromise can be lessened, in my opinion, if you take care of the geographical problem that is presented in the ninth circuit. The biggest problem will be in the southern division, and there is no reason, in my opinion, why every judge cannot live at the place where court is held. If they are in Los Angeles, if they are available to each other, if their chambers adjoin each other, if their law clerks have communication among themselves, then they are not going to have a situation where one panel of the court hands down a decision that is contrary to another panel of the court. The collegiality that is essential to the operation of the judicial process, even if it is necessary to appoint more than an ideal number of judges, could be accomplished in that way, I think.

Mr. WESTPHAL. Mr. Kirkham, it seems to me, then, that really the problem facing Congress is twofold: First, to come up with a realignment for a restructuring which, coupled together with adequate facilities and so forth, permits a system under which a judge of a court of appeals would be expected to deal only with a manageable caseload, assuming that a caseload of 209 is manageable. The reason we want to achieve a lower workload per judge is to give these judges a fighting chance to keep up with the caseload and, hopefully, reduce this backlog. The ultimate goal is to furnish as expeditious a review on appeal as the system can possibly offer. Don't you think that is part of the question?

Mr. KIRKHAM. That is exactly true; yes.

Mr. WESTPHAL. Now, even if we are able to bring the caseload per judge in the ninth circuit down to what the national average was in 1973—about 161 filings—it would seem to me readily apparent that judges, even with that type of a caseload, are going to have to work pretty hard to handle it.

Mr. KIRKHAM. That is true. That is too large a caseload.

Mr. WESTPHAL. Now, in our study of the seventh circuit in Chicago we found that until just a few years ago that circuit was customarily setting three cases for argument every day. It was granting counsel on each side a full half hour. They found, however, that they could not keep up with their calendar. Their backlog was building up. So about 3 years ago they decided to start calendaring six cases per day. Probably four of them would be cases in which oral argument was granted and one or two of them would be a case that was ordered to be submitted on the briefs. In any event, they in effect almost doubled the number of cases that they were calendaring for oral argument.

You were present in the hearing room yesterday when Judge Duniway testified that statistically for the year 1973 each panel of the ninth circuit had 3.3 cases per day on the calendar for argument before the court. The study that the subcommittee made of the 1973 calendars

of the ninth circuit indicates that they had a panel sitting on 333 different occasions during the year. On a given day they might have three or four different panels sitting in the various locations throughout the circuit. Now, out of that 333 days, there were 45 days in which only one case was calendared for oral argument; there were some 46 days where only two cases were calendared for oral argument; and there were 143 days where only three cases were calendared for oral argument. That, then, would leave a total of 99 days out of 333 on which the court calendared four or more cases for oral argument.

Now, I can understand that, if the court has a case which is multi-party or in which it has to accord oral argument to five or six different lawyers who are representing various parties, that that is the type of case which perhaps should be given just 1 day for oral argument.

Mr. KIRKHAM. An unusual case, yes.

Mr. WESTPHAL. But it seems hard for me to accept the fact that there can be 45 occasions during the course of the year where cases of that magnitude would come up in the ninth circuit or 46 occasions on which you would have 2 cases of such magnitude that you would only set 2 cases for argument.

Now, as a result of your extensive experience before the Ninth Circuit Court of Appeals, do you have any opinion as to whether that circuit gets such a large number of complicated cases that only one case should be set for argument?

Mr. KIRKHAM. No. I don't think so at all. You will recall that Judge Duniway did say that, particularly recently, in some of these cases where one, two, or three cases were set for oral argument, there were also on the calendar other cases which were being submitted on the briefs which the judges of that panel would be required to decide at the conference that would follow that session. So perhaps the three cases for oral argument doesn't quite state the full workload of the judges on those panels, particularly recently.

I think that time is wasted in oral argument. I have sat in court rooms—and I am sure you have—where I have listened to lawyers who just have nothing to say. They are taking the time of the court, and it is perfectly obvious that that is so. Now, a strong judge should be able, it seems to me, to control that type of situation. There are cases where argument should be stopped at the end of 5 minutes, where counsel should be told, "This is the only thing that this court is concerned with. Address yourself to that point." When that point has been made, the court should say, "thank you, counsel, now the case is submitted" or "the case is decided." You can turn from one judge to the other and, if they are in accordance with that, the reason should be stated.

I don't think that low a number of cases for argument really represents a full workload, if you take the cases as they come.

Mr. WESTPHAL. Well, the report of the Judicial Conference, which is part of our hearing record in connection with S. 2991, indicates that in the same fiscal year, 1973, there were some 414 cases decided by the ninth circuit on the briefs and without oral argument. That would certainly be more than one for each day of this 333 days on the average. But it seems to me that this analysis of the court's calendar would indicate that there probably would be room for a court—if it were more compact, did not have the prevalent problems and communications problems that that court has—there would be opportunities for that court to calendar more cases per day for oral argument, certainly more than one or two.

Mr. KIRKHAM. I am sure that some more could be calendared, and I am sure more effective judicial consideration could be given to the case. You may recall the testimony you have heard to the effect that judges will sit on the panel, will hear the argument and then, after they have had their short conference, leave. Then they are available only by telephone to write the opinions.

Now, I may say, Senator Burdick, in furtherance of what I earlier said about their oral argument, that I can only think of these 500 cases that you talk about. If the court had sent a letter to counsel and said that in the opinion of the court this case can be decided on the briefs without oral argument unless you request it, there wouldn't be a request. There would be a very small percentage of lawyers that would request an oral argument contrary to the expression of the court.

Mr. WESTPHAL. That is in effect the practice of the eighth circuit?

Mr. KIRKHAM. Yes. So, I don't think you will be burdened with that. I don't think it will make a great difference, but I think the opportunity should be present.

Senator BURDICK. Rather than to let a man proceed, stop him. What do you gain by giving the lawyer an argument when on the face of the briefs he has no case?

Mr. KIRKHAM. You don't gain a thing in that case, Senator, but there is a case where the court suddenly says, "gentlemen, we didn't realize this." If oral argument has any advantage—and it does have, in my opinion, great advantage—it furnishes an opportunity to bring out to the court facts that may not be apparent.

Senator BURDICK. I agree with you, but I am trying to find out how to handle an avalanche of litigation when a lot of it is frivolous.

Mr. KIRKHAM. It is frivolous. I think, in those criminal appeals, if the public defenders and the court says, "We are prepared to decide this case without oral argument," we'll benefit. So many of those appeals are taken for purposes of delay, for keeping the prisoner out of jail, and the government pays the cost of appeal.

Senator BURDICK. That only encourages the complaint?

Mr. KIRKHAM. Or complicates the complaint. I don't think it will make a great deal of difference, but it will be of some help.

Mr. WESTPHAL. One more question, Mr. Kirkham, and then I will be through.

As a member of the Commission on the Revision of the Federal Court Appellate System, you have met with the Commission during its several hearings and meetings after the report of December 1973 was filed, in other words, during the phase II part of that Commission's work?

Mr. KIRKHAM. That is right.

Mr. WESTPHAL. As a member of the Commission have you become aware of any change in procedure, or change in structure, being considered by the Commission during phase II of its deliberations which would obviate the necessity of realigning either the fifth circuit or the ninth circuit?

Mr. KIRKHAM. No, and I wish very much to emphasize that. Mr. Westphal. There are many matters that we are considering. There are problems that relate to criminal appeals. There is the problem of appointing an ombudsman. There may be ways that we can help in eliminating the caseload in criminal cases. There are, of course, other

proposals before the courts. What certainly should be done away with is the three-judge courts. All of those things will effect in part, and hopefully affirmatively, the problems in the Federal courts. But there is not one thing that we can foresee, or that has been brought before us, that could affect the judgment the Commission has made that it is imperative in the interest of justice that these two circuits be divided.

Mr. WESTPHAL. Thank you. I have no further questions.

Senator BURDICK. Thank you very much for your contribution.

Our next witness is Mr. Jan Stevens, an Assistant Attorney General for the State of California.

Mr. Stevens.

**STATEMENT OF JAN STEVENS, ASSISTANT ATTORNEY GENERAL,
STATE OF CALIFORNIA, SACRAMENTO, CALIF.**

Mr. STEVENS. Thank you.

Senator BURDICK. Do you have a prepared statement?

Mr. STEVENS. I apologize for not having a prepared statement at this time. I request the indulgence of the committee and request permission to file a statement, which could certainly be ready within a week. At this time, however, we do not have a prepared formal statement. I appreciate your courtesy.

A second matter will soon be presented to the committee in the form of a letter from the Governor of California, Governor Reagan. I understand the letter was mailed to the chairman yesterday, expressing the views of the governor with regard to the proposed realignment of the ninth circuit. I would request, preliminarily, that this letter expressing his position be made part of the record.

Senator BURDICK. It will be so received.

Mr. STEVENS. Thank you, Mr. Chairman.

[Governor Reagan's letter to the Chairman follows:]

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento, September 27, 1974.

HON. QUENTIN BURDICK,

*Chairman, Senate Subcommittee on the Improvement of the Judicial Machinery,
Senate Office Building, Washington, D.C.*

DEAR CHAIRMAN BURDICK: My attention has been drawn to the recommendation by the Commission on Revision of the Federal Appellate Court System regarding the fate of the State of California in the realigned 9th Circuit. The Commission forwarded to former President Nixon several months ago its recommendations, and they are now embodied in legislation pending before the Congress.

I am taking this opportunity to acquaint you with my strong opposition to the Commission's proposal concerning California. In a radical departure from precedent, the Commission proposes the splitting of California between two Federal appellate court circuits. Currently, California is included in the 9th Circuit, together with Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam. The Commission recommends carving the present 9th Circuit into two circuits: a new 12th Circuit to include Arizona and Nevada and the nine southernmost counties of California; and a realigned 9th Circuit to include Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam and the other 49 counties of California.

The organized Bar in California will make its position known from the standpoint of practicing lawyers. But I must speak out on behalf of the government of the State of California. That my concern is real is evidenced by the fact that over the past three years, the State has been a party (usually defendant) to 349 civil cases in the U.S. District Courts in California, and to 1,021 criminal cases (usually of the prisoner rights, habeas corpus, variety).

Frankly, I see confusion and chaos in attempts to administer statewide programs if we are subjected to the potential of conflicting court orders issued out of the two different circuits in California. Our Corrections, Welfare and Medical Assistance programs are continually challenged in the Federal courts and in the State is split into two circuits, conflicting orders are almost a certainty.

I have reviewed the basis for the Commission's recommendation and believe this proposal is founded on faulty premises. One premise is the arbitrary assertion that no circuit should encompass only a single state. The arbitrariness of that conclusion becomes impossible to defend when it is recognized that there has long functioned a circuit which encompasses only the District of Columbia. Another premise is that the nine southernmost counties of California have a greater affinity for the State of Arizona than they do toward the other 49 California counties. That simply is not so.

I urge you to use your best efforts to oppose this proposal in the Congress. I have instructed my staff to develop alternative plans that will relieve the present overburdened condition of the 9th Circuit without doing violence to the State of California or any other component of that circuit. I will be pleased to share such plans with you or whomever you may designate.

Sincerely,

RONALD REAGAN, *Governor*.

Mr. Chairman, we appreciate the opportunity to appear here today. We are in the position of apologizing to some degree for both the growth of the State of California and its litigiousness. However, we don't feel we are wholly responsible for the latter, and we hope both are leveling off somewhat.

Senator BURDICK. I am sure the other 49 States have experienced your problem at one time or another.

Mr. STEVENS. They have, Mr. Chairman. We have hopes of improvement, however, and would also note that some of the litigiousness is not entirely our fault. Congress has conferred jurisdiction in the past few years that did not exist previously and the courts have themselves assumed some jurisdiction, too.

We appreciate the intense and serious consideration which this subcommittee is giving to what is obviously a very serious problem for the State of California.

The Commission on Revision of the Federal Court Appellate System has acted within necessarily short time limits on a serious question, and of course, has recommended that the geographical boundaries of the ninth circuit be changed to diminish the heavy workload problems.

Of most concern to us, of course, is the proposal that the state be split between two Federal circuits. The Commission, in its report, has properly observed, we feel, that procedures to enhance the abilities of the courts of appeals to dispose of the business before them do deserve greater study. Certainly such study is in order. We hope that it can be achieved to a greater degree before Congress should launch upon the serious step of changing what is a political, legal, and social entity, the State of California. Senator Fannin has referred to the ties that bind Arizona and California. We would respectfully submit that these ties are even closer between the northern and southern halves of the State.

In its report the Commission has pointed out its reluctance to disturb institutions which have acquired, not only the respect, but also the loyalty of their constituents. Furthermore, the report notes that Congress has before it proposed legislation, which, if enacted, may bring significant relief to both the appellate and the district courts. Caseload, the Commission itself notes, is but one of a number of factors relative to circuit realignment, and the procedures which enhance the ability of the courts of appeals to dispose efficiently of the business before them may well be of greater significance.

We believe that procedural reforms in the long run will provide the only real answer to the problems of Federal judicial workloads. We believe the answer lies somewhere between the surgery proposed by the Commission and the mere mechanical addition of judges to an already overburdened circuit.

As the ABA's Special Committee on Coordination of Judicial Improvements has observed, there is a clear need for structural and procedural changes in the courts of appeals. Although that committee has endorsed the report of the Commission, in doing so it has expressly stated that such a proposal should not be interpreted as an expression of confidence; it has stated that realignment will provide mere temporary relief.

The State Bar of California in its presentation has noted the large number of civil and criminal cases filed involving the State of California directly. In the past 3 years the Federal district courts have had 349 such filings in the civil field and 1,012 in the criminal field. During the past 3 years the courts of appeals have entertained appeals in 58 civil cases and in 179 criminal cases in which the Attorney General represented the State of California or one of its agencies. This does not represent the total number of cases in which the State of California is involved, because there are some agencies in which the State is represented by counsel other than the Attorney General, and there are some cases in which special counsel have been appointed. However, it does represent, I think, a fair example of the significance of this problem to the State.

There are a number of programs reaching the ninth circuit which are of substantial importance to the entire State. For instance, of course, the field of prison regulation is subject to increasing Federal judicial review. Our department of corrections maintains institutions throughout the State. Different rules from different circuits could raise insurmountable administrative problems. In this respect, the ninth circuit as a practical matter is the court of final review when the Federal law is applied to California procedures.

Since the Federal courts are entertaining cases involving extensive questions of prison management and control—such as mail regulations, access to media and access to visitors—judicially enunciated rules could be different, depending on the location of the prison, and their eventual resolution—in the form of U.S. Supreme Court review or consolidation—could be extremely difficult.

If in fact there were a period in which differing rules were applicable, claims of denials of equal protection might possibly be raised.

The substantive criminal law is also subject to different interpretations. The entire criminal law could be effected by a proposed division. The opportunities now for diverse judicial division are ripe, and we hope they will not be multiplied. For example, in the field of obscenity the State law has been held by a Federal district court to be unconstitutionally vague. Previously, the California Supreme Court had upheld that statute. If two circuits reached a different conclusion, State authorities would hesitate to enforce State statutes uniformly. There is sufficient confusion now, we submit, and we hope there is not the opportunity for additional confusion in the future.

In the same field, a State court held that no prior adversary hearings are required, and the ninth circuit reached a contrary decision.

Until that decision reached the U.S. Supreme Court, serious problems of uniform law enforcement were presented. The existence of two circuits within the same State would, we feel, accentuate such problems.

In the juvenile field there are similar problems. The ninth circuit held that State procedures for transferring juveniles to a court for handling resulted in the violation of the double jeopardy provisions, whereas the fifth circuit had ruled that no such jeopardy occurred. At least the ninth circuit was a court of last resort for the State of California—the *entire* State and the *entire* juvenile justice system. Precedents from two circuits would have accentuated and greatly prolonged the confusion existing already. In addition, we do believe that with the possibility of two different rules of law, and two different courts, forum shopping would be a temptation and a danger.

Problems also exist in the civil field, because here the development of State resources and the implementation of State programs would be involved. The ninth circuit has presently before it a case involving ownership in geothermal resources patented by the Federal Government and subject to a reservation of minerals. These resources exist in both the northern and southern parts of the State. Presently, in Northern California such plants provide 500,000 kilowatts of electricity. Until an answer is supplied as to the issue of surface ownership and mineral ownership, the further development of this important resource will be delayed and inhibited. Confusion over the issue, if it arises between two circuits, could result in two different Federal rulings concerning the nature and ownership of geothermal resources in California. It is unlikely further development will proceed as long as confusion exists. Hopefully the ninth circuit will resolve what two circuits may fail to resolve.

In the welfare field we have had numerous cases. Recently the ninth circuit has had occasion to rule on many such cases, including questions concerning the necessity to make retroactive payments and the need for payment of overtime pay for women under California law. Ninth circuit rulings on such questions have decided the questions for the State of California and for the State welfare program.

California has, of course, a multi-billion dollar project involving the movement of water from the north to the south. This project is currently in the process of implementation. The source of water developed is, of course, in the northern part of the State. There are projected deliveries to 31 water distribution agencies, beginning in the San Joaquin Valley and the northern part of the projected new ninth circuit and extending into southern California as far south as San Diego. Litigation challenging the present project is currently in trial in the U.S. District Court for the Northern District of California. Should that district court decision be appealed under the existing organization of the ninth circuit, a ruling from that circuit court will have statewide application. If two appellate decisions were issued, however, the water plant could be indefinitely delayed pending final decision by the U.S. Supreme Court. The problem is far from theoretical, inasmuch as the Federal circuit courts are now divided on a number of important questions which are involved in such litigation, such as the application of the National Environmental Policy Act, the Rivers and Harbors Act of 1899, and other Federal statutes which are applicable in the inextricable relationship we have with the Federal Government in such programs.

We hesitate to state that the satisfactory answer can be to resolve such problems at the U.S. Supreme Court level in every case. On the contrary, the overwhelming caseload of the U.S. Supreme Court has been the subject of even more intensive controversy than the one presently before this subcommittee. Recently Chief Justice Burger has emphasized the necessity for *procedural* reforms rather than the mechanical addition of new judges, whether through the creation of new courts or through additions to existing ones.

To utilize, as the Commission's report suggests, such devices as motions for stay, injunctions, and multicourt consolidations would not only require additional legislation; it could impose additional—and time consuming—delays in the form of threshold litigation. Such devices were not designed for such purpose and are, we feel, at best makeshift remedies for the problems caused by splitting the State.

We earnestly suggest that other remedies are available and reiterate our desire to work with the committee, the Commission and others in helping to achieve them. Obviously, there is a need for relief. Pending the Commission's study of procedural alternatives, other solutions are possible. As Justice Friendly stated, "If a stream is a mounting flood, commonsense would dictate consideration of measures to divert a portion of the flow." Alternatives are presently available which could provide some immediate assistance to the ninth circuit. The obvious one, of course, is the creation of new judgeships, which is also, as I understand, before this body and Congress. The Judicial Conference, in 1971, concluded that a court of more than 15 would be unworkable. The ninth circuit now has 13 judgeships, which is admittedly a large number. However, the proposed addition of at least two judgeships at this time could be achieved without reaching the Conference's maximum limit.

Secondly, the subcommittee has considered the establishment of two divisions within the ninth circuit. We will not belabor this problem. We know now, however, that presently the overwhelming bulk of litigation being decided before the ninth circuit is being decided by panels. The panel precedent could be effectively utilized in such a system. A thoughtful study, which was prepared for the Federal Courts Committee of the State Bar, shows that the panel system has widespread use and relative efficiency. As I understand, the original Federal court of appeals was a three-judge court. It has been suggested that the three-judge panel provides the most efficient hearing tribunal, because of the facility by which informal conferences can be held and the minimum delay in assembling judges. One study has indicated that the average elapsed time from oral argument to judgment rose from 2½ months to 4½ months if the court en banc, rather than a panel, heard the case in a particular circuit.

In addition, we would suggest that the increased dismissal of frivolous appeals on motion could be utilized. An analogy is now being attempted with some success in the State of California, in which appeals are increasingly being made the subject of motion by this office rather than undergoing the full-scale hearing procedure. An appeal which is obviously frivolous or lacks merit on its face, we believe, should be effectively disposed of by motion rather than a full hearing.

Then diversity jurisdiction, we feel, deserves reexamination. The screening of cases has been utilized with varying degrees of success. Once again, as Justice Burger noted:

. . . [I]t is not surprising with criminal appeals available at public expense to every convicted indigent defendant, most take appeal. . . . It may be that the time has come to consider whether some other alternative is available. . . .

Twenty years ago, complaints filed in the Federal courts by prisoners in state prisons were hardly enough to give any concern. . . . In fiscal 1972 there were more than 16,000 petitions of various kinds challenging the validity of the conviction, even after full review by other courts.

I would also point out that within recent years more than 4,000 additional cases have been filed under the Civil Rights Act claiming mistreatment or denial of rights. The Justice points out one case—admittedly an extreme one—in which a prisoner in a State penitentiary filed a complaint under the Civil Rights Act claiming a prison guard had arbitrarily taken cigarettes from him. The complaint was dismissed, and the prisoner then took an appeal to a three-judge circuit court, where three judges, after reading briefs and considering his arguments, wrote an opinion remanding the case with instructions to conduct a trial on the merits.

Alternatives can be and should be considered. Justice Burger has aptly pointed out that all these matters are within the jurisdiction of the Commission on the Revision of the Federal Court Appellate System. He has suggested that such things as a statutory procedure for administrative review of prisoner complaints, both State and Federal, might be established, and that informal grievance procedures could be established in the State prison, to hear prisoner complaints subjectively and to deal with them.

The experiences of the attorney generals of all our States indicate that there is a need for relief in this area. A special committee of the National Association of Attorneys General found that the Federal habeas corpus filings alone had increased from 1,020 in 1961 to 9,063 in 1970 nationally. The percentage of such filings has increased from 4 to 18 percent of the total Federal district court workload. The association has requested legislation imposing reasonable limits on collateral attack in the Federal courts, providing an adequate opportunity for review and for hearing on the merits has been provided.

Of course, other proposals, such as Judge Ainsworth's proposal for a special court to entertain questions of Federal criminal appeals and State criminal appeals in which a Federal question has been raised, as well as those complaints with regard to prison conditions, merit some consideration.

In addition, we believe that other procedural alternatives deserve serious considerations. We know we are receiving this consideration here.

The Commission has adopted a number of special criteria in making its recommendations. First of all, they said, where practicable, a circuit should be composed of at least three States, and in no event should a one-State circuit be created. Second, no circuit should be created which would immediately require more than nine active judges.

Third, to the extent practicable, the Commission contended that a circuit should contain States with a diversity of population.

Fourth, of course, the Commission raised the issue of excessive interference with present patterns. The greater dislocation involved in any plan of realignment, the larger the countervailing benefit should be to justify the claim.

Fifth, they recommended that no circuit contain noncontiguous States. Alternatives compatible with the Commission's criteria are available for the realignment and handling of the ninth circuit workload pending more procedural review, and such alternatives can be worked out without interference with present patterns. These alternatives have been discussed at length already before the subcommittee and we know the subcommittee is thoroughly familiar with them.

We commend careful consideration by the subcommittee of them, and we note that there are several notes of optimism in the present sad picture with regard to the circuit workload. A member of the special committee of the San Francisco Bar Association, who will, I understand, appear before this subcommittee, has found that the ninth circuit filings in the first 5 months of 1975 were only slightly more than the same period in 1973, 1,046 as against 1,037, while disposition increased, suggesting a possible leveling off of case load. The Administrative Office of the U.S. Courts is not yet programed to identify the circuit court appeals by district of origin, but other distinctions exist. For instance, criminal matters take about half the time civil matters do. There is at least a temporary pause in the ninth circuit's caseload to permit, we hope, further analysis before a final geographical decision.

The Commission specifically objected to reorganization plans retaining the State of California as a geographical unit on several grounds: first, that it would lack diversity of background caused by judges from different States. We would submit that few geographical areas have the diversity of California in its present form, since it is one of the most metropolitan and most rural of states.

The fact that only two Senators would be consulted in the appointment process was criticized by the Commission. It seems irrelevant to us. As a matter of fact, we feel that a single Senator of long tenure may be more immune from the considerations which disturb the Commission than a number lacking sufficient tenure.

Basically, we fear the proposed appellate review devices would have the effect of increasing rather than diminishing workloads. The Commission contended that, for the five Northwestern States, they would not be warranted, inasmuch as the appeals from such States were such a small part of the circuit. Time did not permit the Commission to make any population projections. We submit the solution would be to have the subcommittee make such studies, utilizing new data from the State courts and demographic data from the States involved. The State of Oregon has reported to us steadily increasing immigration from California, representing a note of hope at least that the Northwest will some day in the near future reach a substantially higher population than it has now.

To conclude, the ninth circuit now has 13 authorized judgeships and an admittedly heavy workload. Faced with the pressures of the deadlines before it, the Commission has made a proposal, receiving relatively little hearing, which would have far reaching effect on California. Such a proposal should not be adopted without further serious study. More consideration must be given, we submit, to the burden of litigation which the various Western States, in addition to California, will enjoy in the future—to changing growth patterns, to the nature

of the judicial workload of the Federal courts, and to procedures to impose reasonable limitations on the explosion of litigation which has arisen during the past few years.

The ninth circuit has an extremely heavy workload which must be alleviated. However, we cannot agree with the specific recommendation that has been made. In the meantime, we would hope that Congress could act to increase the judges available for work in the ninth circuit and to adopt interim relief.

Senator BURDICK. Thank you very much for your contribution.

Mr. STEVENS. Thank you, Mr. Chairman.

Senator BURDICK. Your thoughts seem to be that we should do more studying before we make this decision. In the meantime what happens to the caseload? What happens to the backlog while we are studying?

Mr. STEVENS. We appreciate this concern, and I think it is very appropriate. We hope that there are several devices available which can assist the ninth circuit in dealing with its caseload.

First of all, we would be more than happy to cooperate with the increased utilization of motions for the dismissal of appeals which lack merit on their face.

Senator BURDICK. I am sure any judge will tell you that it often takes as much time to consider a motion as it does a case.

Mr. STEVENS. That may be, Mr. Chairman. It is an experiment that we are attempting in the California appellate courts in the hopes that it will save time rather than utilize just as much. We are getting some experience with that, and I hope it will prove favorable.

Senator BURDICK. You mentioned procedural reforms, and suggested that there might be something done about diversity jurisdiction. This subcommittee has been trying to do that for several years, but the lawyers are fighting any diversity change like tigers.

Mr. STEVENS. I can understand your problem, Mr. Chairman.

Senator BURDICK. We have to deal with things as they are. Now how do you suggest we change diversity?

Mr. STEVENS. I can understand the problem and the reason that it hasn't been solved as yet. We hope that some progress can be made if the alternatives seem obvious enough.

Senator BURDICK. When the Board of Governors of the A.B.A. sends a resolution in a letter to the committee and says nothing about diversity, I wonder if that really is an alternative.

Mr. STEVENS. I admit, nothing could be easier than coming in and attacking proposals before you, and that finding reasonable alternatives is harder.

Senator BURDICK. Well, given the size of these caseloads we are talking about, I wonder if changes in diversity jurisdiction, even if accomplished, will provide very much relief. We are still looking at very heavy caseloads.

Mr. STEVENS. That is right. It is by no means a final solution, Mr. Chairman.

There are a number of things we hoped would assist, but obviously no one of them is going to solve our problem.

Senator BURDICK. You mentioned prisoner cases and diversity. What other things might we do to save judge power?

Mr. STEVENS. Basically, these are the immediate ones which have come to mind.

Habeas in Federal court actions, Federal civil rights actions which we discussed, the question of diversity jurisdiction which must be considered——

Senator BURDICK. What do we do about habeas?

Mr. STEVENS. Well, we have a proposal which is presently pending before both houses. That has been, in successive years, to limit the utilization of habeas in the form of review of State court judgments which have already been considered, and an adequate opportunity given to defend at the State court level.

Senator BURDICK. You still have the problem of that big workload. We have asked witness after witness if he had any alternative but to go by the suggestions of the Commission. None have yet come forward with specificity.

Mr. STEVENS. Yes, Mr. Chairman. Of course, the subcommittee has had before it the proposal with regard to division, and the proposals with regard to California as a single circuit or one which is aligned with perhaps Nevada or one other additional State. These admittedly would not have the same symmetry of figures that would be the case if the Commission's proposal were adopted. But nevertheless, it would avoid some of the problems which we think are so severe in dividing the State in two.

Senator BURDICK. Are you aware of the testimony before this committee that it is the consensus of the judges, at least, that once you pass the figure "nine" for the number of circuit judges, you then get into the area of diminishing returns? That opinion is upheld by statistics, too. When you pass nine, your workload per judge is reduced because of administrative travel and other problems. Do you agree with that?

Mr. STEVENS. I have heard such testimony, Mr. Chairman. I am sure that a nine-judge court would be the best possible solution. I believe that much of this testimony has been based on the belief that there is a necessity to have more en banc hearings. I am not sure this has been conclusively established, or that the use of the present panel system is not perhaps just as efficient, considering the relative disuse of en banc hearings even in smaller circuits.

Senator BURDICK. I believe that you have recently had 33 en banc's in the ninth circuit. How else can you handle them but by calling in everybody from all parts of the district? How else can you handle an en banc hearing?

Mr. STEVENS. That is a tremendous problem in court administration, Mr. Chairman. If a split is made at the level of the Northwest States, however, I would suggest that much of the travel will be eliminated. It isn't half as hard to get from Los Angeles to Seattle.

Senator BURDICK. That is one problem we have when we start increasing judges. The en banc problem gets greater and greater.

Mr. STEVENS. There is no question of that.

Senator BURDICK. I have a very important engagement. If you have no objection, technical questions by the staff will now be asked. Do you mind if I am absent?

Mr. STEVENS. No.

Senator BURDICK. Thank you, again.

Mr. WESTPHAL. Mr. Stevens, in your testimony you made reference to Judge Friendly's proposals about how you handle the problems of a stream of cases when the floodgates have overflowed. Of course, there

are a couple of ways to take care of that stream. Out in the midwestern part of the country, which has a very flat terrain, they have built what they call "judicial ditches." They are drainage ditches, but they are called "judicial ditches," because usually the water course extends beyond county lines and, rather than let the county board take jurisdiction over it, they refer it to the district court. The district court then decides how this stream that has overflowed is going to be properly drained so that all the land around it will not be flooded. Basically, you can help prevent flooding by cleaning out the deadwood, silt, and everything else so that the stream can carry the capacity it was intended to carry.

I take it your suggestion about resolving frivolous and unmeritorious appeals by motion practice is in that vain. It is an attempt to get some of the deadwood out of the stream of judicial business that comes into the courts of appeals. Do you think that is a fair analogy?

Mr. STEVENS. That is correct.

Mr. WESTPHAL. The problem is that someone has to make the determination whether the matter is frivolous or unmeritorious. If that determination is made by a judge, as the chairman indicated, it still takes time for the judge to review the case, read the record, read the briefs and come to this conclusion. There are appellate judges who have told us that it is much easier to schedule the thing for oral argument, because then you can dispose of it faster, giving greater satisfaction to counsel, than if you determine it after the so-called screening process.

The other way that you can remove deadwood from the stream of judicial business is to have the determination that the case is frivolous or unmeritorious made by a core of law clerks or "staff attorneys," without the intervention of the judge. How long do you think that the Bar of California, or of any other State, would tolerate a procedure under which that decision was made by a staff attorney without the intervention of a judge? How long do you think the bar of any State would be satisfied with that type of decision?

Mr. STEVENS. That determination must be judicially made.

Mr. WESTPHAL. Suggestions have been made that there is so great a volume of this so-called deadwood, consisting of frivolous and unmeritorious claims, and that the judges are so overworked, that there is a tendency to accept the decision of the clerk or "staff attorney." You then run the risk, in the eyes of some lawyers, that you are forcing that judge to simply rubberstamp whatever his law clerk recommends to him, simply because he is so busy trying to keep up with the opinions he has to write, briefs he has to read in preparation for oral argument, and listening to oral argument that he doesn't have time to pause and reflect upon the recommendations given by his staff. You do recognize that there are these pros and cons to this possibility of clearing the deadwood from the stream of judicial business, don't you?

Mr. STEVENS. Of course. This has to be viewed with respect to the entire workload problem, with determination of appeals on the merits as well as determinations of motions.

Mr. WESTPHAL. Now, the Commission, in phase II of its work, has in fact received testimony from one intermediate courts of appeals in which it explained the procedure by which it employed staff attorneys to go through this culling procedure and recommend a rather summary

termination of cases lacking in substance. The very question that I just posed was raised by the commission. While much had been said for it in terms of expediency and efficiency, something can be said against it because of the risk that you may create a rubberstamp procedure which will satisfy neither the litigant nor the attorney. There are real problems with that type of an attempt to avoid the flow.

Now, there is another way that you can avoid the flow of judicial business. You can make some major changes in the channel of the stream. You can impound some waters at the head of the stream and impound others at various intervals along the stream. This is an approach that some of these circuits have employed quite unconsciously, probably without any volition on their part. We have heard testimony that 601 cases ready for argument have been impounded and they have been held "impounded" for some 5 or 6 months waiting for the judges of that court to have sufficient time to hear the oral arguments in them. We have heard about impounding cases at a later stage in the stream where there are a large number of cases that are held awaiting decision for a period of 3 months, and some for a period of 9 months. That type of impounding, it seems to me, is not acceptable in our concept of due process. Would you agree with that analysis?

Mr. STEVENS. Obviously any solution that is suggested is going to have problems, and I think your analyses are good ones.

Mr. WESTPHAL. There is another way of changing the structure of the stream that has overflowed, and that is to have two channels for that stream where you previously have had one. If you can put half of the floodwater in a new channel that is just as big as the old channel was, then you perhaps can avoid the flood that way. It seems to me that this is, basically, the recommendation of the Commission on Revision of the Appellate Court System: to give two channels to handle a flood of 2,700 cases which the present channel of 13 judges is physically incapable of handling with a degree of relative dispatch.

Mr. STEVENS. The general present Federal policy as I understand it, if it engages in creating two channels where one existed before, is to prepare a fairly exhaustive environmental impact report. Such projects in the past have given rise to considerable controversy, and litigation as to the adequacy of such an impact report. I think one of our points here is that all of the impacts to California must be given more consideration. We are afraid that the impact will be more adverse than it is advantageous, considering all the other factors involved.

Mr. WESTPHAL. All right. The Congress asked the Commission on Revision of the Federal Appellate Court System to study the environment of our appellate courts, to give us some kind of an impact statement, and some recommendations as to a solution for the problems which arise when a particular appellate environment is somewhat polluted. The Congress itself has been subjected to criticism because it does not give enough consideration to that. However, in fact, the record will show that in this current Congress, the chairman of this subcommittee has been instrumental in preventing some 26,000 unfair labor practice cases from being thrown into the Federal district courts in lieu of having them handled by the General Counsel of the National Labor Relations Board. It will also show that, when there was a bill approved to correct abuses in real estate closing procedures, where the

buyer was being allegedly overcharged on some real estate closing expenses, and the proposed legislation would have given a \$500 award of damages to anybody who was not given notice of the amount of closing, that bill was changed so that it would not come under the jurisdiction of the Federal district courts but would only come under the jurisdiction of the State court in the State in which that particular piece of property was located. I could cite other examples of efforts to prevent new jurisdiction. Now there may indeed be some criticism due to the Congress for creating new causes of action, but what is Congress to do? We had a witness here yesterday, Mr. Jordan Dreifus, who appeared with Mr. Abel of the California State bar. Mr. Dreifus, I believe, is interested in some jurisdiction in the area of air crash litigation. Now if the Congressmen who study the problem of aircraft crash litigation determine that there can be no other remedy for that serious problem than to create Federal jurisdiction, then I think the Congress must create Federal jurisdiction. These matters are not easily resolved and they directly influence this matter of controlling the input into the Federal courts. That input has increased and probably will always increase until we find better ways of solving disputes in our country than by bringing them into courts.

Mr. STEVENS. No question about it.

I believe the chairman has made some extremely valuable observations in his efforts to act upon legislation or to stop legislation which unnecessarily creates a new Federal cause of action immediately. Perhaps the Environmental Policy Act was another example, where an expert administrative review of Federal decisions could be made without the need to immediately resort to the Federal courts in every case in which Federal action is questioned.

Mr. WESTPHAL. You made a good point that various areas of law are under consideration, but the problem is that the resolution of those particular problems is something that takes time, and in the meantime, as the chairman said, what are we to do with the 2,700 cases filed in the ninth circuit, the 2,400 in the fifth circuit, and the ever-increasing backlog?

There are only a couple of other matters I would like to mention.

You suggested that there is hope ahead because the statistics for the first 5 months of calendar year 1974 were somewhat less than for the first 5 months of calendar year 1973. The problem with that statistic is that those first 5 months of calendar year 1974 were 5 of the last 6 months of fiscal 1974, which was concluded on June 30, 1974, and the Administrative Office reports that, in fiscal year 1974, the total filings in the ninth circuit increased by some 16 percent. So instead of leveling off, I think we have to be able to recognize that you have a 16-percent increase over 1973 in the workload of the ninth circuit, and the number of current final determinations don't come anywhere near meeting that kind of an incoming caseload.

I have a couple questions that I would like to ask you about the work of the Attorney General of California as far as management of the litigation of the State is concerned. You now have four Federal trial courts in the State of California?

Mr. STEVENS. That is right.

Mr. WESTPHAL. To what extent does the State get involved in litigation in those Federal courts—whether in the area of welfare

cases or juvenile cases or geothermal cases or whatever—where the same legal issue is involved in a case brought by someone in the eastern district in California and in a case brought by someone else in the central or southern district of California? How often has that occurred during the period of time you have been in the Attorney General's office?

Mr. STEVENS. I can't give you an exact figure, but I think that has happened fairly frequently with regard to criminal cases.

Mr. WESTPHAL. In what way does the Attorney General handle that problem when it does arise? What steps do you take in that situation?

Mr. STEVENS. In the criminal area particularly, we insure that the Federal district court involved is familiar with the fact that the same issue has arisen elsewhere. Very often consultation is impossible or impractical, and therefore we at least appraise the court of this fact and hope for, if not coordination immediately, ultimate coordination at the ninth circuit level.

Mr. WESTPHAL. Where I practiced law, and I think under the common law at least, a lawyer in that situation could also make a plea of abatement in the second action and ask that court to hold action on the issue until it was decided in a court which already had the matter under consideration. Is that in effect what you attempt to do in that situation in so far as the four district courts in California goes?

Mr. STEVENS. Particularly where a trial is at issue. Very often matters can be disposed of by motion, but where a trial is available, we certainly make that effort.

Mr. WESTPHAL. So in as far as this problem of having two courts in different jurisdictions dealing with the same issue of law as it affects a State agency in the State of California, that is a problem that you have to deal with now even though California is in its entirety within the ninth circuit, isn't that true?

Mr. STEVENS. We do, suggest, of course, that all of the districts of the ninth circuit are subject to the decisions of that circuit.

Mr. WESTPHAL. Alright. So really what you are saying is that the problem with the possible splitting, to use that term, of the State of California into two different appellate circuits is that you fear that, by that split, you would lose the umbrella effect of the Ninth Circuit Court of Appeals as presently constituted sitting in judgment on the work product of the different Federal district courts in California. That is what you fear, is it not?

Mr. STEVENS. That is correct.

Mr. WESTPHAL. All three of these bills that are before the committee contain, as mentioned here earlier this morning, a provision whereby the Supreme Court of the United States is required to take jurisdiction, to grant an appeal as of right, in any case in which you would have a conflict between an appellate decision from the new ninth circuit and an appellate decision from the new twelfth. Do you feel that that would be adequate to resolve the conflict that you fear would arise?

Mr. STEVENS. No, we don't, Mr. Westphal, for several reasons. First of all, as I read the provision in the pending legislation, it applies only to those instances in which the validity of a State statute or administrative regulation is being challenged. It would not apply to cases

where the courts of California are construing California law, and it could very arguably not be applied to cases where the conformity of a State program—such as the water plan—to applicable Federal laws and regulations is being challenged. Those are both important fields.

Last of all, I think, the chairman pointed out that such a procedure, if broadened, as it would have to be to solve all our problems, would add once again to the workload of the Supreme Court, perhaps moving us from the frying pan into the fire.

Mr. WESTPHAL. Well then, if you do have a possible conflict—and we have had testimony to suggest that it has never occurred in the last 13 years in as far as California is concerned—but if you can get a conflict resolution mechanism that doesn't require you to overload the Supreme Court of the United States and doesn't require you to come to Washington for a resolution of the conflict, then that would eliminate much of your objection to the recommendation of the commission, wouldn't it?

Mr. STEVENS. First, the testimony that you referred to is that there has not been a conflict between *three-judge* courts, which I believe is accurate. There have been, on a number of occasions, conflicts between decisions of *individual Federal district courts* within the State of California which have been resolved at the ninth circuit level.

Secondly, we think perhaps the very best mechanism for resolving potential conflicts between the Federal courts is one court of appeals. Of course, this is our purpose in being here—to urge that one court be retained.

Mr. WESTPHAL. In the existing ninth circuit, with conditions as they exist today, you can have the northern district of California in conflict with the southern district of California or the eastern district in conflict with the central district of California on the same point of law as it affects the operation of the State government in California. You can have that?

Mr. STEVENS. That is right.

Mr. WESTPHAL. Under the commission's proposal, that condition isn't going to be changed whatsoever at the trial level.

Mr. STEVENS. Except for the fact that the Federal district courts in the north and those in the south would be guided by different circuit courts.

Mr. WESTPHAL. I am talking about the trial level; that isn't going to be changed at all under the commission's proposal.

Mr. STEVENS. The district courts will remain the same but they will be guided by different appellate courts.

Mr. WESTPHAL. Different appellate courts, but we cannot assume that those different appellate courts would take different views, one from the other, of the same legal issue.

Mr. STEVENS. I would hope you are correct.

Mr. WESTPHAL. But if they should take different views on the same legal issue arising from different district courts and affecting the California State government, then what you would want to see is a means of resolving that conflict in such a fashion that the resolution of it would be binding upon all four of those Federal district courts, no matter what circuit they may be in, whether in the same circuit or in different circuits. Isn't that what you desire?

Mr. STEVENS. That would be essential.

Mr. WESTPHAL. Then the essential point is achieved—and really it should make no difference whether those four districts courts are under one umbrella or under two different umbrellas—as long as, when it comes to the precedential effect of the conflict resolving opinion, that opinion is binding upon all four of those courts, no matter what name we give to them or how we place them in the structure. Isn't that true?

Mr. STEVENS. I agree that a mechanism could be fashioned. I think it would be extremely hard to fashion one which would make the decisions of one circuit binding on the future decision of another circuit. In order to have some certainty in advising the State regarding its statewide actions, that is really just about what we would have to have.

Mr. WESTPHAL. But if that could be achieved you will be satisfied?

Mr. STEVENS. In effect we would really have a single circuit, which is what we are arguing for.

Mr. WESTPHAL. Then what we are talking about, Mr. Stevens, is not nomenclature. We are not talking about the configuration on a map or anything of that kind. We are talking about trying to preserve some judicial unit as far as the State of California is concerned; isn't that true?

Mr. STEVENS. Absolutely.

Mr. WESTPHAL. Just one last thing. You indicated earlier that you would prepare from the notes that you used in your presentation here this morning a typewritten statement that you could then send the committee. I would appreciate it if you would do so.

Mr. STEVENS. I would appreciate the opportunity to do so.

Mr. WESTPHAL. Thank you, Mr. Stevens.

Mr. STEVENS. Thank you.

[The prepared statement discussed above follows:]

STATEMENT OF CALIFORNIA ATTORNEY GENERAL EVELLE J. YOUNGER

Acting within the necessarily short time limits imposed upon them by Congress, the Commission on Revision of the Federal Court Appellate System has recommended that the geographical boundaries of the Fifth and Ninth Appellate Circuits be changed in order to diminish heavy workload problems of those courts. Specifically, and of most concern to us, the Commission has recommended that the State of California be split between two federal circuits.

The Commission has properly observed that procedures to enhance the ability of the courts of appeal to dispose of the business before them deserve greater study. Certainly such study is in order before Congress should launch upon the serious and detrimental step of splitting the legal, political, and social entity of California into two circuits. We believe that such a measure would result in immeasurably more harm to the rule of law in California, and to the proper administration of California's government, than the short term convenience it might provide for the federal appellate workload.

In its report, the Commission commendably points out its reluctance "to disturb institutions which have acquired not only the respect but also the loyalty of their constituents," and notes that in fiscal 1973 the number of filings in the U.S. District Courts decreased for the first time in at least a decade. Report of the Commission on the Revision of the Federal Court Appellate System 3 (December 1973). Furthermore, the Commission's report notes that Congress has before it proposed legislation "which, if enacted, may bring significant relief to both the appellate and the district courts." *Id.* at 4. The report states that "caseload is but one of a number of factors relevant to the question of circuit realignment," and "[P]rocedures which enhance the ability of the Courts of Appeal to dispose justly and efficiently of the business before them may well be of greater significance." *Ibid.* Nevertheless, the Commission has recommended the realignment of the Ninth Circuit to split California in two, and legislation has been introduced to implement its recommendations.

We believe that procedural reforms will, in the long run, provide the only real answers to the problems of federal judicial workload. Somewhere between the drastic surgery proposed here and the mechanical addition of judges to an overburdened circuit, we believe, lies the solution. As the Special Committee on Coordination of Judicial Improvements of the American Bar Association has observed, there is a "clear need for structural and procedural changes" in the federal Courts of Appeal, and "*real* relief for the federal appellate courts" must come from such proposals (emphasis added). Although that Committee endorses realignment of the Fifth and Ninth Circuits, it expressly states that such a proposal "should not be interpreted as an expression of confidence that realignment will provide much more than temporary relief." Report, Special Committee on Coordination of Judicial Improvements, American Bar Association (October 1973). We understand that Congress has provided the Commission a more extensive opportunity to examine other means of facilitating the federal appellate process in H.R. 3052, and we stand ready to work with the Commission in its study.

To split the State of California would cause immeasurable problems in the administration of justice and the government of the State. California is economically sixth among the nations of the western world (or would be if it were a nation). It is the largest state in the Union. It is essential that the Federal appellate decisions which govern California programs and California law be uniform. Litigation involving the State of California alone, in which this office usually represents state agencies and programs, illustrates the problems that can result from two separate rules of law.

Civil Law

Over the past three years civil cases have been filed involving the State as follows:

Northern District-----	94
Central District-----	171
Eastern District-----	66
Southern District-----	18
Total -----	349

Criminal Law

As of January 1, 1974 the State was represented by this office in pending civil rights and habeas corpus actions in the federal district courts as follows:

Northern District-----	348
Central District-----	399
Eastern District-----	224
Southern District-----	50
Total -----	1,021

In the past three years, 58 civil cases and 179 criminal cases in which the Attorney General represented the State or one of its agencies reached the Court of Appeals. Those cases which reach the Ninth Circuit involve programs of substantial importance to the entire State of California. For instance:

1. Prison regulations are increasingly subject to federal judicial review.

The Department of Corrections maintains institutions throughout the State. Different rules from different circuits could raise insurmountable administrative problems. Since the federal courts are entertaining cases involving extensive questions of prison management and control, such as mail regulation and access to media *Procunier v. Martinez*, — U.S. —, 40 L. Ed 2d 224; *Pell v. Procunier*, — U.S. —, 41 L. Ed. 2d 295), judicially-enunciated rules could be different depending on the location of the prison, and could even result in claims of denial of equal protection.

2. Substantive criminal law could be interpreted differently.

The entire field of criminal law in California could be affected by the proposed division. The opportunities for diverse judicial decision are rife now and should not be multiplied. For example, in the field of obscenity, a three-judge district court in the Central District of California has held the state obscenity statutes unconstitutionally vague. *Miranda v. Hicks*, Civil 73-2775 F (appeal now pending to the U.S. Supreme Court, 42 L.W. 3122). Previously, the state courts had upheld these statutes. *People v. Enskat*, 20 Cal. App. 3d Supp. 1, 98 Cal. Rptr.

646, 33 Cal. App. 3d 900, 109 Cal. Rptr. 443, (pet. for cert. denied 94 S. Ct. 3225). When state and federal courts reach different conclusions, state authorities may hesitate to enforce state statutes uniformly. In the same field, state courts have held that no prior adversary hearings are required in obscenity cases under California law, *People v. DeRenzy*, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777; whereas a contrary decision was reached in the same case by the Ninth Circuit, *Demich, Inc. v. Ferdon*, 426 F. 2d 643, judgment vacated 401 U.S. 990. Until the U.S. Supreme Court decided *Heller v. New York*, 413 U.S. 43, serious problems of uniform law enforcement were presented. The presence of two circuits within the same state would exacerbate these problems.

Similarly, in the juvenile field, the Ninth Circuit recently held California's procedure for transferring juveniles to adult courts for handling resulted in violation of the double jeopardy provision of the Fifth Amendment, *Jones v. Bredd*, 497 F. 2d 1160, pet. for cert. pending, 43 L.W. 1995; whereas the state courts had previously ruled that no such jeopardy had occurred, *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185.

With such possibilities, forum-shopping would be more than a temptation.

3. *The development of State resources and implementation of State programs would be imperilled.*

The Ninth Circuit presently has before it a case involving the ownership of geothermal resources in lands patented by the federal government, subject to a reservation of minerals. *U.S. v. Union Oil Co., et al.*, 369 Fed. Supp. 1249. Geothermal resources exist in both the northern and southern parts of California. Presently combined power plants in operation at the Geysers in Northern California produce approximately 500,000 kilowatts of electricity. The lack of a clear answer to the question of ownership between surface owners and mineral owners has inhibited further development of this increasingly important resource. Confusion over the issue between two circuits could result in different federal opinions concerning the nature and ownership of geothermal resources within California. It is unlikely that further development will proceed as long as such confusion exists.

In the welfare field over the past several years California has been involved in litigation involving many cases and a total potential liability of some 12 billion dollars. Recent Ninth Circuit rulings have involved such questions as the necessity to make retroactive AFDC payments, *Bryant v. Carleson*, 444 Fed. 2d 353; 465 Fed. 2d 111 (9th Circuit) and the necessity for payment of overtime pay for women under California law, *Homemakers Inc. v. Div. of Industrial Welfare*, 356 Fed. Supp. 1111, Northern District of California (Appeal pending) (1973).

California's billion-dollar project to move water from the north to the south is currently being implemented. The source of water developed by this project is in the northern part of the state. Projected deliveries to 31 water distribution agencies extend through the San Joaquin Valley and into southern California as far south as San Diego. Litigation challenging present project operations and future development is currently in trial in the U.S. District Court, Northern District of California, *Sierra Club v. Morton et al.*, No. C-71-500 CBR. Under the existing organization of the Ninth Circuit, an appellate ruling would have statewide application. If two circuits existed, however, the water plan could be indefinitely delayed pending resolution by the U.S. Supreme Court. The problem is far from theoretical. Federal circuit court decisions are now divided as to the application of the National Environmental Policy Act (one of the statutes at issue in the *Sierra Club* case) and the Rivers and Harbors Act of 1899.

Indeed, the availability of direct state appeals to the Court of Appeals arising from federal actions or inactions with regard to specific state programs is impressive. There is a direct appeal provided the State of California and, in some cases, its local governments, to the Ninth Circuit from the following federal actions:

Educational aid programs (20 USCA 241(h)).

State public library service plans (20 USCA 351(d)).

Federal revocation of aid for state education programs (20 USCA 641).

Federal action on state library grants (20 USCA 827).

Grants for educational planning (20 USCA 869(a)).

Student incentive grants (20 USCA 1070(c)-3).

Educational professions development grants (20 USCA 1110(c)).

Federal facility construction grants (20 USCA 1132(a)-7).

Federal community colleges grants (20 USCA 1135(b)-7).

Basic education for adults (20 USCA 1207).
 Education of handicapped children (20 USCA 1413).
 Federal unemployment tax credit allowances (26 USCA 3310).
 Federal collection of state income taxes (26 USCA 6363).
 Review of federal action on revenue sharing (31 USCA 1263).
 Review of EPA water quality actions in promulgating standards, passing on state standards, promulgating effective standards, etc. and passing on state permit programs (33 USCA 1369b(1)).
 Review of federal hospital construction grants (42 USCA 291).
 Unemployment Administration grants (42 USCA 504).
 Public assistance determination (42 USCA 1316).
 Review of EPA actions in approving or promulgating state air quality implementation plans (42 USCA 1857h-5).
 Mental retardation project grants (42 USCA 2694).
 State community grants for the aging (42 USCA 3025).
 Older Americans volunteer program grants for nutritional programs (42 USCA 3045(d)).
 LEAA grants (42 USCA 3759).

We appreciate the recognition of this problem set forth in section 7 of Senate Bills 2988-2990. That section provides for a direct appeal to the U.S. Supreme Court.

"[W]here is drawn in question, the validity of a State statute or of an administrative order of statewide application on the ground of its being repugnant to the Constitution, treaties, or laws of the United States: Provided, however, That this subsection shall apply only when the court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States."

However, as we indicated in our testimony before the Subcommittee on October 2, 1974, this provision fails to meet the problems before us in several significant ways:

1. It fails to meet the problems created by *federal* actions affecting statewide programs. We have cited above 23 federal statutes giving the states direct access to the Courts of Appeal over contested federal actions. The specter of two rules of law looms unaffected by section 7.

2. Section 7 requires that the decision complained of be in actual conflict with the decision of another court of appeals. *Potential* conflict remains a problem. The development, for instance, of geothermal resources, will still be clouded where the potential for conflict exists between circuits.

3. Section 7 is limited to cases in which the validity of a "state statute or administrative order" is questioned. State programs or practices falling short of being statutes or administrative orders would not be covered. Nor would cases involving questions of the application of a state or federal statute. Litigation over such significant issues as the California Water Plan and ownership of geothermal resources falls into this latter category.

4. Section 7 requires the court of appeals to certify that its decision is actually in conflict with that of another court of appeals. Such conflicts are to be avoided in the first place, rather than kicked upstairs to an already overworked Supreme Court for resolution. Once the conflict exists, the damage is done in terms of confusion, impairment of state programs, and possible unequal application of laws.

It is not a satisfactory answer to suggest that problems of such magnitude can be adequately determined by the U.S. Supreme Court. To the contrary, the overwhelming caseload of that Court has been the subject of much more intensive controversy than the one before you. In a recent article, Chief Justice Burger has emphasized the necessity for procedural reforms rather than the mechanical addition of new judges, whether through the creation of new courts or through additions to existing ones. Burger, "Report on the Federal Judicial Branch—1972," 59 A.B.A.J. 1125, 1126 (1973).

To utilize, as the Commission's report suggests, such devices as motions for stay, injunction, and multi-court consolidations would impose costly and time-consuming delays. Such devices were not designed for such a purpose, and would be at best makeshift remedies.

OTHER REMEDIES ARE AVAILABLE

We are mindful of the need for relief, and suggest that, pending the Commission's study of procedural alternatives, other solutions are possible. As Justice Friendly has stated, "If a stream is in mounting flood, common sense would dictate consideration of measures to divert a portion of the flow." Friendly, "Averting the Flood By Lessening the Flow," 59 Cornell L. Rev. (1974).

1. *Create more judgeships.* A U.S. Judicial Conference in 1971 concluded that a court of more than 15 would be "unworkable." While the Ninth Circuit now has thirteen judgeships, an additional two positions could be created without reaching that maximum limit established by the Judicial Conference. See, e.g., H.R. 14024 (93d Congress, 2d Session).

2. *Establish two divisions.* Serious consideration should be given, in the interest of effective administration, to the creation of two divisions within the circuit. The overwhelming bulk of litigation now is being decided by panels, and the panel procedure could be effectively utilized in such a system. A thoughtful study prepared for the Federal Courts Committee of the State Bar of California shows the great age, widespread use, and relative efficiency of the panel system. The conclusion that three-judge panels provide the most efficient hearing tribunals is widely accepted, because of the facility by which informal conferences can be held and minimum delay in assembling judges. See Pound, Appellate Procedure in Civil Cases 384 (1941); A.B.A., Report on the Internal Operating Procedures of Appellate Courts 52-59 (1961). Indeed, one study showed that the average elapsed time from oral argument to judgment rose from two and a half to four and a half months if the en banc court rather than a panel heard the case. Note, En Banc Hearings in the Federal Courts: Accommodating Institutional Responsibilities, 40 NYU L. Rev. 563, 577 (1965).

3. *The courts should consider increased dismissal of frivolous appeals on motion, and issuance of brief per curiam opinions.* An analogy now being attempted with some success in the state courts of California is the procedure by which opinions of the Courts of Appeal must be certified for publication—to avoid the flood of largely repetitious published opinions.

4. *Diversity jurisdiction should be re-examined.* Implicit in the Commission's recommendations is the assumption that the present limits of federal jurisdictional are sacrosanct. Yet, Chief Justice Burger points out, "Today there is no rational basis to put an auto accident case in a federal court merely because the litigants reside in different states." Burger, *supra*, at 1126. See, also, Friendly, "Averting the Flood By Lessening the Flow," 59 Cornell L. Rev. 634 (1974).

5. *Greater attention should be paid to the screening of cases.* "It is not surprising that with criminal appeals available at public expense to every convicted indigent defendant, most take appeal. . . . It may be that the time has come to consider whether some other alternative is available as, for example, a procedure requiring a litigant to secure leave to appeal." Burger, *supra*, at 1127.

6. *Prisoner petitions should be re-examined.* Justice Burger has pointed out the increasing problem caused by prisoner petitions. "Twenty years ago complaints filed in federal courts by prisoners in state prisons were hardly enough to give any concern. In fiscal 1972 there were more than 16,000 petitions of various kinds filed challenging the validity of the conviction, even after full review by other courts. In addition, prisoners have filed more than 4,000 cases under the Civil Rights Act claiming mistreatment or denial of rights."

In one case, Justice Burger writes, "A prisoner in a state penitentiary filed a complaint in a federal district court under the Civil Rights Act claiming that a prison guard had arbitrarily taken seven packages of cigarettes from him without justification. The district judge dismissed the complaint. The prisoner then took an appeal to the Court of Appeals for the Third Circuit, where three circuit judges after reading briefs and considering his arguments wrote the opinion remanding the case to the district court with directions to conduct a trial on the merits. *Russell v. Bodner*, No. 72-1788 (May 29, 1973). Under established procedures, the three circuit judges first had to submit their proposed opinion and the concurring opinion of one of the three to the other six members of the Court of Appeals who were not assigned to the case."

Justice Burger aptly points out that "All these matters are within the jurisdiction of the Commission on Revision of the Federal Court Appellate System." Burger, *supra* at 1128, and suggests that alternatives be considered, specifically, including:

1. Creation of a statutory administrative procedure to provide for hearing prisoner complaints administratively within the prison, and requiring these procedures be exhausted before any proceedings could be filed in federal court.

2. Establishment of informal grievance procedures in the state prisons to hear prisoner complaints. *Id* at 1125.

The experience of state attorneys general compels similar calls for relief. A special committee of the National Association of Attorneys General found that federal habeas corpus filings alone had increased from 1,020 in 1961 to 9,063 in 1970; or from four to eighteen percent of the total federal district court caseload. For the past ten years, the Association has requested legislation imposing reasonable limits on collateral attack upon state court judgments. E.g., S. 567, 93d Cong. 1st Sess. (1973). The Judicial Conference of the United States now has this subject under study, and we are optimistic of a constructive consensus.

And Judge Haynsworth's proposal for a National Court of Criminals Appeals, to entertain questions of federal criminal appeals, state criminal appeals raising a federal question, and claims of state and federal prisoners attacking prison conditions, merits consideration. Haynsworth, "A New Court to Improve the Administration of Justice," 59 A.B.A.J. 841 (1973).

The National Association of Attorneys General has asked that Congress consider proposals for review of sentencing contended by defendant to be excessive, limitation of the time for petitioning for removal of a criminal prosecution from a state court, a prohibition upon unnecessarily delayed or successive petitions attacking state court judgments, and legislation to curb abuse of the federal writ of habeas corpus by state prisoners. Report of the Committee on Habeas Corpus, National Association of Attorneys General (1973). Any attempt to detail these proposals would be unnecessarily lengthy at this time. However, we would be happy to outline them or any one of them should the committee so desire.

MORE STUDY SHOULD BE GIVEN TO OTHER ORGANIZATIONAL ALTERNATIVES

In making its recommendations, the Commission has adopted express criteria:

1. Where practicable circuits should be composed of at least three states: in any event, no one state circuit should be created.
2. No circuit should be created which would immediately require more than nine active judges.
3. To the extent practicable, the circuits should contain states with the diversity of population, legal business, and socio-economic interests.
4. Excessive interference with present patterns is undesirable . . . the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change.
5. No circuit should contain non-contiguous states. Report, *supra*, at 7.

Except for the Commission's determination that no one state circuit should be created, alternatives available for realignment and handling Ninth Circuit workload pending more intensive procedural reviews are available and can assist the Circuit in handling its work without "excessive interference with present patterns." For example, if physical reorganization should be deemed essential, several viable alternatives exist:

1. Create a new circuit of California, Nevada, Hawaii, and Guam, shift Arizona into the Tenth Circuit, and establish a separate circuit composed of Alaska, Washington, Oregon, Idaho, and Montana. Such a proposal would clearly avoid the dislocations inherent in splitting California.

The Commission rejected this proposal on the grounds that the new circuit would have had "close to 1,700 filings in fiscal 1973" and that much of the area was expected to experience "substantial growth." However, California's substantial growth of the last twenty years appears to be leveling off. Data suggests the existence of at least a temporary pause in the rate of growth of California, sufficient to permit further analysis before a final decision.

2. Establish a new circuit composed only of California, splitting the existing circuit into two divisions.

The Commission's objections to alternative reorganization plans are as follows:

1. A one state circuit would lack sufficient diversity of background added to or brought to a court by judges who have lived and practiced in different states . . . moreover only two senators, both from a single state, would be consulted in the appointment process; a single senator of long tenure might be in a position to mold the court for an entire generation. Finally, a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that it now obtains . . ."

We respectfully submit that few geographical areas have the diversity enjoyed by California, which at once is the most metropolitan and the most rural of states. Its position in this respect can be favorably compared with the Second Circuit (composed of New York, Vermont, and Connecticut, staffed eight to one by New York judges, and with 75 per cent of its workload from New York). The fact that only two senators would be consulted in the appointment process seems irrelevant. As a matter of fact a single senator of long tenure might be more immune from political considerations than several without such stature.

2. The Commission suggests that such procedural devices as transfers between circuits, transfers of venue, consolidation, stays, injunctions, and statutory interpleader could be used to avoid potential conflicts between the circuits. However, such procedures would have the effect of increasing rather than diminishing judicial workload. In addition, they would impose unnecessary and unwarranted costs upon the parties than by way of preliminary proceedings.

3. The Commission contends that a separate circuit for the five northwestern states is not now warranted. The Commission staff points out that appeals filed from the five northwestern states (Alaska, Washington, Oregon, Idaho, and Montana) in fiscal year 1973 accounted for only 17 per cent of the workload of the circuit, and totaled slightly less than the filings in the three-judge First Circuit. However, population projections for the northwest states are much greater than those for the southern states and California. Obviously, time did not permit the Commission to make any definitive population and workload projections, nor is such effort made here. However, it is respectfully suggested that a most realistic solution to the immediate problem would be to permit the Commission to make such studies, utilizing new data from the Administrative Office of the Courts, and from the demographic units of the various state governments involved.

CONCLUSION

The Ninth Circuit now has 13 authorized judgeships and an admittedly heavy workload. Faced with the pressures of immediate deadlines, the Commission on Revision of the Federal Appellate Court System made a proposal which received relatively little hearing and which would have far-reaching and irreversible effects on the legal and political structure of California. Such a proposal should not be adopted without further serious study. More consideration must be given to the burden of litigation which the various western states will enjoy in the future, to changing growth patterns, to the nature of the judicial workload of the federal courts, and to procedures which will impose reasonable limitations on the explosion of federal litigation which has arisen during the past few years. In the meantime, we recommend that Congress act to increase the judges available for work in the Ninth Circuit and to adopt interim relief in the form of realistic limitations on federal jurisdiction.

Senator BURDICK. The committee stands in recess until 10 o'clock tomorrow morning.

[Whereupon, at 12:35 p.m., the committee recessed to reconvene at 10 a.m. the next day.]

CIRCUIT REALIGNMENT

THURSDAY, OCTOBER 3, 1974

U.S. SENATE,

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL
MACHINERY OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, Brian C. Southwell, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. This is the third day of hearings on the geographical realignment of the ninth judicial circuit.

Our first witness this morning will be the Honorable John F. Kilkenney, U.S. Court of Appeals, Ninth Circuit.

Judge Kilkenney, welcome.

STATEMENT OF HON. JOHN F. KILKENNEY, U.S. COURT OF APPEALS, NINTH CIRCUIT, PORTLAND, OREG.

Judge KILKENNEY. Good morning, Mr. Chairman.

Senator BURDICK. You may proceed in any manner you wish.

Judge KILKENNEY. I have some notes, Mr. Chairman, upon which I will probably improvise from time to time.

I would like to proceed in that manner, and then, of course, I would be happy to answer any questions you may have.

Senator BURDICK. Very well. Your prepared statement will be entered in the record in full at this point and you may proceed in the manner you have just described to us.

[Judge Kilkenney's prepared statement follows:]

PREPARED STATEMENT OF JUDGE JOHN F. KILKENNEY [NINTH CIRCUIT COURT OF APPEALS]

Mr. Chairman and other members of the Subcommittee:

I start with a quotation from the 1968 Report of the American Bar Foundation Advisory Committee on the workload of the U.S. Court of Appeals: "On balance, it is more desirable to add judges, above the number of nine, than it is to create more circuits." One reason is obvious, the greater the number of circuits, the greater the caseload on the Supreme Court.

First of all, permit me to emphasize my belief that what we need in the Ninth Circuit are five new judgeships, rather than the creation of a new circuit. As early as 1971, five new positions were recommended. As yet, we have none. It is obvious that without additional judgeships, the splitting of the circuit will accomplish nothing. Needless to say, I am not one of those who believes that a

circuit of 18 or even 21 judges is unmanageable. In support of this thinking, I need only point to the superb performance of the 15 judges in the Fifth Circuit where the calendar is up to date and to a lesser extent to the performance of the 13 judges in the Ninth Circuit, where with district judge and other help, the criminal calendar is up to date, but the civil calendar is lagging. I say, with firm conviction, that if we had had five additional circuit judges on, and since the time of the 1971 recommendation, our calendar, both criminal and civil, would be current and I doubt if we would be here arguing over whether the circuit should be split.

In my opinion, a panel of three active judges working for ten months in the ensuing calendar year, would competely eliminate the Ninth Circuit's civil backlog. Already, we are utilizing the equivalent of two additional circuit judges by the use of district judges. This means that the chief judge is already administering a 15-man court and with the use of three rather active senior judges and a few outside judges, in reality, is sitting on top of a 17- or 18-man court. Of course, I do not argue that the use of district judges at the circuit judge level is a wholly efficient operation. But the present utilization of that many bodies clearly demonstrates that there is little, if any, validity to the argument that the efficiency level of a circuit stops at the magic number of *nine*. Give us an adequate number of judges and you can forget the splitting of the circuit.

For that matter, it is the founded opinion of more than one of our circuit judges that if we had the two additional judgeships which were recently recommended by the Judicial Conference on an emergency basis, and had the additional legal staff, the proposal for which has been approved by the Judicial Conference and is now before the Congress, we would be current on both our civil and criminal calendars within 15 to 18 months.

Next, I speak on what might be termed an alternative to splitting the circuit. Here, I would emphasize that the studies outlined in subsections (a) and (b) of Sec. 1 of Public Law 92-489 should be concurrent and that the subject matter of (a) cannot be intelligently studied without a companion analysis of (b). In my opinion, we should not divide or restructure the circuits without first considering what, if any, jurisdiction should be removed from the district and circuit courts, such as agency decision reviews, three-judge courts, diversity jurisdiction and some type of a limitation on appeals in 2254 and 2255 proceedings. I say this well knowing that the Commission was under a mandate to first submit a report on the study directed in subdivision (a).

In any event, an outright cleavage of the Ninth Circuit is neither necessary nor desirable. As an alternative, it is suggested that the circuit be restructured into two divisions: (1) a Southern Division to consist of the Central and Southern Districts of California and the District of Arizona. This alignment would account for approximately one-half of the present appeals, and (2) a Northern Division to consist of the Northern and Eastern Districts of California, Oregon, Idaho, Nevada, Washington, Alaska, Hawaii and Guam. This group is presently responsible for approximately one-half of the appeals.

One Circuit Chief would preside over both divisions, with a Division Chief to preside in each division. The first Chief to be appointed would carry over from the present circuit, with tenure as provided by law, his successor to be selected by the Chief Justice from the active judges of both divisions, the vacancy to be filled by the President. The Division Chiefs would be selected in a manner provided by rule of court in each division.

The principal office of the circuit to remain in San Francisco. The principal office of the Northern Division to be San Francisco and the Southern Division, Los Angeles. Places of holding court in the Southern Division, Los Angeles and Phoenix, and in the Northern Division, Portland, Seattle, Anchorage, Honolulu and San Francisco.

Each division to have nine active judges. *In banc* proceedings in each division would be heard by nine judges. In case of conflict in opinions between the two divisions, the Chief Circuit Judge would call a circuit *in banc* proceeding, in which four judges from each division, and the Chief Judge would participate. In-division selection of the four judges to be by rule.

The restructuring of the circuit into divisions, rather than a split into separate circuits, would permit a free flow of judge power, both circuit and district, between the divisions and would eliminate what appears to be the political nightmare of attempting to divide California into two circuits.

Beyond that, I think it is relevant to consider the historical background and physical aspects of the circuit. The circuit was created in 1860 consisting of the states of Oregon, California and Nevada. Strangely enough, it was then known

as the Tenth. We were first designated the Ninth by the legislation of 1866. Thus, it would appear that we have had a uniform body of law, insofar as it can be uniform, in the circuit for well over 100 years. We have had and certainly now have the longest coastline of any circuit in the United States. Armed with the great ports of San Diego, Los Angeles, San Francisco, Portland, Seattle, Anchorage and Honolulu, we have created an immense body of maritime law which is followed from Point Barrow, on the northern tip of Alaska, to the Mexican Border and west to Honolulu and Guam. Many of the great admiralty cases which reached the United States Supreme Court originated in our circuit. Surely, we would be flying in the face of the tides of reason to split the circuit and set up two courts which might go in opposite directions on this fundamental body of jurisprudence.

Moreover, this plan would have the built-in advantage of utilizing the existing court facilities in San Francisco and Los Angeles, which are now sufficient to accommodate the administrative functions of each division and of the circuit as a whole. The plan would no doubt save the expenditure of a vast sum of money in the creation of a new facility in the Northwest. Only in Portland, has the Circuit a building of sufficient capacity to accommodate the personnel of a new Circuit.

From a practical viewpoint, this plan is workable and, with the shedding of certain types of jurisdiction, would be adequate for the foreseeable future. The creation of a separate Northwest Circuit consisting of Alaska, Idaho, Montana, Oregon and Washington would accomplish nothing. Those districts are responsible for only about 15% of the appeals. The combined appeals of those states would not justify over a three or four judge court. This would be true even if Nevada, Hawaii and Guam were included. The suggestion that California might be a separate circuit is illogical. The state now provides 67% of the appeals and it is predicted that the case growth in that state will be far greater than in any other section of the circuit. The present appellate load created by California federal litigation would require the services of all, or practically all, of the present complement of judges. Placing California in a separate circuit would truly be an exercise in futility.

Of the 64 district judges who returned ballots on an appropriate questionnaire, 38 voted in favor of a division, rather than a split of the circuit. Only 14 favored a split. The remainder expressed no opinion.

This division plan could well be a pilot experiment in connection with the expanding suggestion that what we may need is one single national circuit court, operating in separate or distinct districts or divisions under the administration of a national chief judge who would utilize the judges where the services were most needed and who would present legislation sufficiently in advance to avoid this constantly recurring crises created by lack of judge power.

The national court here mentioned bears no relationship to the intermediate appellate court suggested and sponsored by Judge Shirley M. Hufstедler. However, I would go on record in favor of the Hufstедler proposal. It would eliminate *in banc* problems and, without going into detail, would otherwise lessen circuit court burdens.

An Advisory Committee of the American Bar Foundation as early as 1968 advanced a somewhat similar plan as a solution and was of the view that such a system, by creating additional divisions, could employ up to thirty judges in a circuit.

A substantial number of our recent *in banc* cases grew out of Supreme Court decisions on obscenity law and drug traffic checkpoints along the Mexican border. Others out of construction and interpretation of recent environmental and other controversial legislation. This type of case would probably go *in banc* no matter what the size of the circuit.

Statistical information submitted by the Commission on the interchange between the northern and southern district judges is subject to challenge. In substantial part, the flow of southern judges to the north, is occasioned by the judges normal vacation months, and if the flow were stopped neither the northern nor the southern districts would benefit. The argument that most of the northern help is from senior judges and would be available even on a split is faulty. If the circuit were split, this judge power would not be then available except through the Committee on Intercircuit Assignments. The Arizona district judges quite consistently move to the north or to the coast during the torrid heat of the Arizona summers. In place of twiddling their thumbs in Arizona or vacationing elsewhere, they are working in the northern or coastal districts. To the contrary, the north-

ern judges are directed to the distressed areas in both working and vacation periods.

I am authorized to say that the Oregon Circuit and District Judges are in complete agreement in favoring divisions, over an actual split in the circuit.

Finally, and only, if in your wisdom you conclude that the circuit must be split, then I would reluctantly favor the recommendation of the Commission that California be split along the lines suggested in its report.

On the humorous side, one of the judges who has been on the Court of Appeals for five years expressed the view that the only thing wrong with a large court is that the judges cannot get together for a group picture. A major point, I concede. Nonetheless, he is hopeful of a picture in the near future and would rather bypass that addition to judicial history, than see a split in the circuit.

In closing, I repeat that what we presently need more than anything else is immediate legislation creating four additional circuit judgeships in the Ninth Circuit. This need is desperate. No one argues that we will need less than that number even if the circuit is realigned or restructured into separate divisions or circuits. The need is now. I will not repeat that we may split, divide or restructure the circuit, but we will not bring the calendar up to date until we receive more judgeships.

Needless to say, Mr. Chairman, we are most grateful to the members of the Committee and Counsel for affording us this opportunity to present these views on this most important subject.

Judge KILKENNY. I am here primarily at the suggestion of Judge Chambers. I do not mean that we agree in the entirety; we do not. But it seems that some of my thinking is in line with the thinking of the Chief Judge of the Ninth Circuit Court of Appeals.

We have problems in the ninth. Of course, that has been recognized, but we have some serious problems. The most recent statistics would indicate that the problems are beyond those which were considered by the Commission. Senator Burdick, in that there were 2,694 filings in 1974. Probably Judge Duniway has already mentioned that fact.

Now, I want to point this up. I think it is important to look at what has happened in the ninth circuit. When the additional four judges were authorized following the 1966 quadrennial survey, there were 9 judges, and they terminated approximately 800 and some odd cases. Nevertheless, at that time, under different circumstances, it was felt that there was a need for four additional judges. They terminated approximately 100 cases per judge.

Now, in fiscal 1974, with 13 active judges, the ninth circuit terminated over 2,500 cases, or approximately 200 cases per judge. True enough, the 13 judges were assisted by what you might call a massive infusion of district judges, and, to some extent, by outside judges and senior judges. So that during the past 2 or 3 years the ninth circuit has not been operating a 13-judge court, but in fact has been operating with a 17- or 18-judge court under very, very difficult circumstances.

I assure you it is not easy to go from week to week, day after day searching for district judges to sit on a panel.

First of all 13 judges was an unfortunate number. It left one judge up in the air on a three-judge panel system. That extra judge made it necessary to call in district judges or outside judges or senior judges in order to complete a panel.

If the same standard were—and I am not saying that it should be—but if the 1968 standard were applied today, the ninth circuit would be entitled to 25 judges rather than the 13 which it has.

Now, of course, I am not asking for an application of the 1968 standard to the problems of today. Through the employment of various

devices, often times challenged by both the bench and the bar—and in particular by the bar—such as screening the present congestion of cases, the elimination of oral argument, a tight reign on criminal appeals, and the utilization of district judges and outside and senior judges, we have made our criminal calendar current. It has been current for approximately a year.

Regrettably, I cannot say the same thing about the civil calendar. But while I am on the subject, and in explanation of what has happened to our civil calendar, first of all we must give precedence to the criminal calendar. Next, we must give precedence to the habeas corpus cases, the 2255's, and literally dozens of other kinds of priority cases which have been dictated by the Congress.

When the four judges were authorized in 1968, it seemed that the positions might be filled within a reasonable period of time. Judge Hufstедler was appointed, I think, within 6 or 7 months, and then the administration—the Johnson administration—was faced with what we might call the Justice Fortas problem, so that there wasn't another appointment to fill the remaining three positions during the Johnson administration. They went over into the first Nixon administration. Those positions were not filled until approximately October 1, 1969. So, in effect, we did not have a 13-man court until 1970.

In January, 1970, Judge Barnes took senior status. That vacancy went unfilled, I think, for approximately 9 months. Shortly thereafter Judge Hamley—this was in 1971—took senior status, and his position was not filled for well over 2 years. It wasn't filled until August of 1973. In the meantime, Judge Carter retired, and there were some problems on that, and his vacancy wasn't filled for approximately 8 or 9 months, or possibly longer.

This, of course, is not in criticism of the Congress. I have no intention of doing that.

Senator BURDICK. These senior judges continued to work, though, didn't they?

Judge KILKENNY. Yes. I have mentioned that. Senator Burdick. I have mentioned that they did continue to work, and that makes up some of the 18-man force that I mentioned at the opening of my statement. There is no question about it. Most of them still continue to work far above and beyond duty, I would say. They do a substantial amount of work, and they are to be given credit for that. But nevertheless, we didn't have the active judges, and the senior judges do not work on the committees and do not take full calendars. After all, the committee work in itself in the ninth circuit, on motions to dismiss and other serious motions that are presented on appeal, requires a substantial amount of time. When those judges took senior status, they no longer served on those committees. In any event this backlog occurred, you might say, starting with fiscal year 1971. I think, if you will check back, you will find that at that time we had a backlog of around 10 months. That includes both criminal and civil cases. The majority there, again, was made up of the civil caseload, and this civil caseload has not substantially increased since the time when we fell behind for failure to get our vacancies filled on the 1968 authorization.

There is another point I want to mention. It relates to the statistics which were furnished by Mr. Westphal. I know that if there was an error, it was an unintentional error. But at page 81 of the Hearing

record on S. 2991, he points to the performance of the second circuit in turning out 499 signed opinions, while the ninth circuit, in utilizing many more judges, filed only 471 full blown opinions. I think in checking the statistical information you will find that in fiscal 1973, which is what we are talking about, the second circuit filed 365 rather than 499 signed opinions and 78 per curiams. Now, compare that to the performance of the ninth. The ninth had 1,347 cases submitted, argued and submitted, of which 498 were signed opinions, 498 as against 365, and 692 were per curiam opinions.

When we are talking of a per curiam in the ninth, we are talking about a normal reasoned opinion. It is an opinion—I have examples here which I can file with the clerk—it is an opinion participated in by all of the judges, and probably the only reason it is not an “authored” opinion, or “full-blown,” is that more than one judge has actually participated in the language, the body, of that opinion.

So as against the second circuit’s 78 per curiams, we have 692. Compare the figures for 1974; the second disposed of 819 cases after hearing or submission, 336 signed opinions, 97 per curiams and 386 without written opinions.

I might interrupt here to say that I have served on the second circuit. I do know of the method used in the disposal of cases. I am not speaking against it. I just happen to be one that does not believe—nor do the other members of our court—in disposing of cases from the bench after an oral argument, and probably a vast majority of the 386 disposals of the second circuit were from the bench. In the ninth circuit, there is either a written order, a written memorandum, a written per curiam, or a written opinion.

Now, in that same year the ninth disposed of 1,483 cases after hearing or submission, 444 signed opinions, 375 per curiams—correction—575 per curiams, against 97 in the second and 464 disposed of by either order or memorandum.

Now, to mention, and it seems to me to detract from the performance of the ninth, that 61 different judges served in fiscal 1973. We don’t dispute the figure, but I would like to point out that of the 61, approximately 25 percent, possibly one-third, were district judges from the north or other districts already sitting in Los Angeles or San Francisco and they were called up for 1 or 2 days. They were not there for a week, not sitting for a week. They were called up there for 1 day. So when you speak of 61 judges, why, you are not speaking of 61 circuit judges that have been assigned for a week. You are probably speaking of around 25 percent of the district judges called up for a very short period of time, sometimes 2 days, sometime 1 day, and they are doing that in connection with a regular district court assignment to either San Francisco, or Los Angeles. It also happens in Seattle and Portland.

I don’t believe that the “full-blown” or the signed opinion is a measuring standard of the judges’ work. I think you do have to work to do the per curiams. You have to look to the other work of the court. Some of our memoranda are truly “full-blown” opinions, but since they just answer counsel’s arguments and have nothing to do with new law in the circuit or otherwise, we feel that we shouldn’t create a burden on the lawyers or other courts by sending that material on to West Publishing Co. for publication.

Mr. Chairman, I hope that it is appropriate to refer to your remarks in the Kentucky Law Journal as set forth in the transcript of the

hearings on S. 2991. I am in complete agreement that the collegial nature of the court should be maintained in the interest of efficiency, harmony, and quality, but nonetheless—and I quote from your remarks—“While these are vital characteristics of an appellate court, it is submitted that an increase in judges beyond the supposed maximum will neither destroy nor seriously impair the effective work by the court.”

I further agree with your comment that, “The necessary interchanging of views between judges would still be possible were the number of judges to exceed 15 or even 20.” In any event, we should be given the opportunity to try out an 18-man court, or now, it would seem from the 1974 statistics, maybe we must have a 21-man court. I don’t know.

I additionally agree with your remarks that the present inadequacies in our system cannot be relieved by a resort to any short term expediency, but rather that “It can be achieved only by shaping a long-range plan which will meet the needs of our appellate system not only in 1975, but also in 1990.”

The split of the ninth circuit in the present proposal will not even meet the needs of today in the ninth circuit.

Now, with reference to my proposal for divisions, to try out divisions in the circuit rather than to split it, I know I am arguing against the recommendation of the Commission. A broad outline of the proposal is in the report of the Commission and in the material which I filed with the Commission at the time of the hearing in Portland. I am authorized to say that approximately 60 percent of the district judges in the ninth circuit favor this division plan. Only 20 percent oppose it. The remaining 20 percent didn’t express a view. The vote was approximately 3 to 1 in favor of division rather than a split. All of the judges in Oregon, and I am speaking of circuit and district, favored a division system rather than a split. At this moment I would mention the letter of Judge Goodwin, I believe, to counsel. Then there is a more recent letter that Judge Goodwin wrote to you, Mr. Chairman, which I believe may be in the files. If not I have copies which can be filed.

[EDITOR’S NOTE.—The letters from Judge Goodwin to Mr. Westphal, dated September 25, 1974, and to Senator Burdick, dated September 27, 1974, referred to by this witness were both incorporated into this hearing record during the session held on October 1, 1974. Pages at which the letters may be found are listed in the index to this volume.]

The CHAIRMAN. In any event, he favors the division viewpoint rather than a split, if a division would be possible. All of the judges in Oregon and Arizona and, I believe, all the district judges in Idaho and Montana, are in favor of divisions. So is the State Bar of Arizona and the bar of the city of San Francisco. In my file I have a letter from Seth Hufstедler in which he says that the State Bar of California had not actually passed on this proposal as yet, but that they were giving consideration to it. I don’t know whether they have passed on it at this time.

Now, in commenting on the division plan, the bar of San Francisco—I was going to note what they said, but I note that Mr. Petrie is here this morning, so I will leave it to him.

We feel the advantage of divisions over a split are: first and foremost, less work on the Supreme Court. No matter how you look at it, once there is a split, why additional work is presented to the Supreme Court. Next, the keeping of a uniform body of maritime law from the Arctic Circle to the Gulf of California and westward through Honolulu and Guam. Also, fewer problems with California State law, and I believe, of significant importance—despite what is said in the report of the Commission—the free-flow of circuit and district judges from Alaska to California and vice versa. Now, I am firmly convinced that the division proposal is worthy of a try and better than anything else that has as yet been proposed.

Now, the division proposal is not really new thinking. In 1968, a report of the special committee of the American Bar Foundation recommended, "When the judges exceed 15, a division system should be adopted where judges are assigned on a routine basis, with each division having support for specific substantive subject matter. Up to 30 judges could be accommodated within a given circuit under this substantive division concept."

Now, I do not go so far as suggesting a *substantive* division concept. I believe that would be more complicated than the division which I have suggested, although I believe there is considerable merit in that concept.

We might think of this: Isn't it obvious that, if in 1968 this circuit had actually been split, with six judges in one circuit and seven judges in another, and with the tremendous influx of filings since that time, would we not be faced with precisely the same problem with which we are now faced?

Now, finally, and this is only if the subcommittee concludes that the circuit must be split, then, and only then, would I reluctantly join in the recommendation that California be split along the suggested lines. If there is to be a split, I think that that is the only way of doing it. Although I do not think it wise: it is probably a political nightmare to contemplate. Nevertheless, I can't honestly say that I find anything insurmountable in the plan.

However, on the basis of fiscal 1974 statistics, the legislation should provide for 11 judges in the twelfth circuit and 9 judges in the ninth circuit. If the plan is adopted, the California Legislature, and this might require some doing, could outline a procedure similar to the Florida legislation under which either circuit could seek the advice of the California Supreme Court on any troublesome questions of State law. By the same token, I see nothing judicially sinful in creating a one-State circuit in California. To me there is nothing sacred in the number "nine." Presently the appeals in California would require the services of the entire complement of the court of 13 judges. What would remain is what has been referred to as a "horse shoe circuit," commencing in Arizona, extending north through Nevada, Idaho, Washington on to Alaska and then southwest to Hawaii and Guam. On creation of such a circuit I venture to say there would be considerable infighting over the location of the headquarters of the circuit, and being somewhat of a gambler, I would bet on Reno.

Mr. Chairman, the foregoing is a capsulized version of my views. Again, I say that the answer to the immediate problem is the creation of a substantial number of additional circuit judgeships, the cleavage of the circuit or the divisions within can await further study. The

creation of additional judgeships just cannot wait. Otherwise, in keeping our heads above water, there is no alternative to the continued use of district and outside judges, in which case we will in effect be operating an 18- or 19-man circuit court. Hopefully this testimony will be of some help in solving this exceptionally acute and very difficult problem for your committee, Mr. Chairman.

Now, if it is your wish, why I would be open to questions. I hope I can answer them. I don't claim to be an expert on the entire system.

Senator BURDICK. Thank you, Judge, for your contribution this morning.

You didn't detail your differences between the division and a split.

Judge KILKENNY. I didn't want to go into that detail, Mr. Chairman, and take the time here. That is in substance set forth in the showing which I made before the Commission.

Senator BURDICK. Now, one of the problems that we face in not splitting the circuit is the loss of judge time and the loss of judge power that attends en banc hearings. The testimony from many witnesses indicated that, while there is no magic in the number nine, once we get beyond nine in the number of judges, we see diminishing returns. That seems to be the testimony of Judge Duniway and the testimony of many other judges. Do you want to speak to that?

Judge KILKENNY. Yes, I would. First of all I would point out, Mr. Chairman, that the statistical evidence from both the fifth and the ninth circuits absolutely disproves that you lose something in the decisional procedures when you increase the number above 9 and even above 13, up to 15. What is the experience in the fifth? They are up to date. They have been using 15 judges. Now, true enough, the bar is not satisfied with what is going on, and I think that I personally might be critical of some of the methods. But nevertheless, that court is operating.

What about in the ninth circuit, where at least for the past 3 or 4 years we have been operating all the way a 16- to an 18-man court through the use of district judges? What did we do last year? We terminated approximately 200 cases per active judge. I don't care what is said on the outside; I think that statistics prove that it can operate and that it does operate.

Now, with reference to this loss of time in a large court, I happen to have my station in Portland. I have never utilized the government's time in going to court. I have traveled on Sunday every time I have ever attended court in Seattle, Anchorage, Los Angeles or San Francisco. No time is lost there. My briefs are with me and I am reading all the time. Now, if you want to say that I am losing time on my return flight, I concede that is possible. Nonetheless, I try to utilize that time in reviewing the arguments, and, on occasion, writing rough drafts of opinions. We outside judges, who can reach our chambers in 5 or 10 minutes each morning, do not waste nearly as much time as the San Francisco and Los Angeles judges who spend up to an hour or more each day in reaching their chambers.

In a year I devote at least two-thirds of the Saturdays to working on the cases that are before me. I know that is true of Judge Goodwin, possibly not as much as I do, but most of the outside judges work on Saturday, and I don't think that you would ever find many San Francisco judges down in the courthouse on Saturday. They, of course, might take their briefs home with them, it is true.

So I think it is wrong to say that you lose, actually lose any available time in the trip between your station and headquarters. In any event, the only way to stop it would be by legislation under which the judge would have to declare his station at the headquarters, and that could be done, of course. I think that those appointed would accept it or they wouldn't be judges.

Now, there was a third part to your question, Mr. Chairman, and I think that I have lost it someplace in my response.

Senator BURDICK. I think the third part concerned en bancs.

Judge KILKENNY. Yes. Well, on the divisional end of it, I thought that we would have two nine-man courts. Frankly, I now think we must have more, but if we had two nine-man divisions the overall chief of the two divisions would select four judges from each by lot, and he would preside. I see nothing wrong, Mr. Chairman, in an en banc court of nine judges. Whatever they decided would be the law of that particular circuit until the Supreme Court overturned it. There is nothing wrong with that.

Senator BURDICK. When you select four judges in a nine-man court you really do not have a majority.

Judge KILKENNY. Well, that is very true, but you have a majority of the entire circuit when you have nine.

Senator BURDICK. You have testified in terms of having 21 judges.

Judge KILKENNY. I think you may have to have 21 judges, Mr. Chairman. I am now speaking of the nine. If you have 21, I don't think that presents insurmountable problems. While on the question of an en banc, I think the Congress should give the courts authority to settle what number of judges will sit. A simple majority should be sufficient.

Senator BURDICK. Do you have any mechanics for how you pick the four?

Judge KILKENNY. Oh, yes, by lot. We do it all the time on our panels. Mr. Chairman. Every one of our panels is picked by lot, so there is no problem on that. I don't think any judge in the ninth circuit will say that there has ever been a problem in connection with selection of panels.

Senator BURDICK. And you think that procedure is satisfactory for the total representation on the en banc?

Judge KILKENNY. Well, Mr. Chairman, I have sat on a 13-man en banc, and frankly, I would much rather sit on a 9-man en banc. Now, what really happens is you have seven in the front row and six in the back row. We all have a bit of ham in us, and we all want to ask a question here and there, and by the time we get around to the ninth judge, the attorney who is presenting his argument is just willing to quit anyway. So I don't think it makes much difference whether it is a 9- or 13-man court, but certainly a 13-man court is not a satisfactory en banc court.

Senator BURDICK. If 13 isn't satisfactory, certainly 20 wouldn't be.

Judge KILKENNY. If we get up in that field we should have a different method, Mr. Chairman, of selecting the judges, or the type of panel, that is going to sit en banc.

Senator BURDICK. What do you think about the screening process? Do you favor it?

Judge KILKENNY. Yes. I must modify that. You asked me a general question.

I do believe that possibly in 50 percent of the 2255's and the 2254's, the State habeas, that come before us, that they probably should be screened or, as we are now calling it, predigested. These cases are not worthy of oral argument. I feel that the attorneys in most of these cases, who think that they may be faced with a law suit if they don't appeal, take the appeal for the very purpose of getting it out of the way on appeal. I know you are familiar with some of the types of briefs with which we are faced. Most of the questions have been decided so many times that it would be a futile thing to grant arguments in those cases, or even take the time generally of the judges in reading the briefs before the arguments. I certainly favor screening to a certain extent. There is no alternative when you have an excessive amount of work. It is a method that was worked out in the fifth and I just say thank God for the work in the fifth. If we hadn't utilized screening in the past couple of years, a kind of a semiscreening and a hitching post, as Judge Chambers calls it, to bring the criminal appeals up to us right now, why, in place of being say 16 or 18 months behind in the civil field alone, we would possibly be a year behind in the criminal field and 2½ years behind in the civil field. It is something that should be considered by the committee, that if Judge Chambers, having the personality which he has, hadn't been able to bring in this high volume of district judge power from all over the circuit, what would be the present condition of the calendar in the ninth?

We have, as you are probably familiar with, a bill before the Congress which would kind of bring us up to the fifth in manpower. They have three law clerks per active judge and we only have two. There is one-third extra power there.

This bill, although the clerks would be handled in a different manner, and it may never get through the Congress, is good legislation and I favor it. If this bill passes, and if we could get even two more active judges, we could turn this thing around in about 18 months. If we get this extra help that is in the legislation which is now before the Congress, it would be a great help.

Senator BURDICK. With all this talk about screening, it seems to me that, in terms of the Supreme Court, the certiorari process could be described as a screening process.

Judge KILKENNY. There is no question about it. I have never been on the Supreme Court, of course. I have never worked as a law clerk on the Supreme Court or had that type of contact. But it is known that the Court cannot dispose of all its cases without going through some type of process similar to screening.

Senator BURDICK. I just give that as an example, and in most cases we have already had appellate review.

Judge KILKENNY. Yes.

Senator BURDICK. Staff has a few questions.

Mr. WESTPHAL. Judge, first let me say this: with reference to the figures I was using on page 81 of the hearing record of the omnibus circuit court bill—which you took some exceptions to and corrected this morning—I checked back against the record and some of the exhibits. I think what happened there is that I spoke with reference to 1973 figures, as the hearing record shows, and I must have been looking at the 1972 figures from this special judicial Administrative Office exhibit which we received in evidence in connection with that.

Judge KILKENNY. Well, needless to say, I knew it was an inadvertence.

Mr. WESTPHAL. There was also a copy of the Administrative Office exhibit, which I think is a part of their regular annual report, an exhibit prepared by the Administrative Office in which they show how many judges wrote what types of opinions and how many opinions in particular circuits. Their figures in that special exhibit may have been a case or two off from the figures that they showed in this report. But in any event, whatever the true figures are, the record will prove either that I was wrong and you were right, or vice versa.

Judge KILKENNY. Well, I thought since it put the ninth in a rather bad light, I thought I should mention it.

Mr. WESTPHAL. To compare the second circuit and the ninth circuit, you can't just look at the raw statistics and divide them by the number of authorized judges, because we all recognize that the second circuit is blessed with a great supply of senior judge power. As the second circuit says, for example, they do not want a 10th or 11th judgeship created for their court as the judicial conference would like to recommend. We have to recognize that the second circuit position is influenced by the fact that they have some six or seven active senior judges, if I may use that phrase, who are probably putting in 80 per cent as much time as they did before they took senior status.

Also, in the ninth circuit, as you have pointed out, you can't really regard that as being just a 13-man court, because, if you make allowance for the 50 active district court judges that were pulled in on assignment from district courts throughout the ninth circuit, plus the 10 senior district court judges that were pulled in to sit on panels, plus your other visiting judges and your own senior judges within the ninth, the manpower of the ninth circuit is obviously more than the 13 authorized judges. Isn't that true?

Judge KILKENNY. Oh, no doubt. As I said, I believe it might add up to 18 if it was ever figured out.

Mr. WESTPHAL. The other day, when Judge Duniway was here, he made reference to the fact that, in fiscal year 1973, the active judges—and you only had 12 active judges at that time—that was before Judge Sneed was appointed—in fiscal year 1973 there were a total of 911 judge days devoted to sitting on panels, exclusive of en banc hearings: 575 of those days were furnished by the 12 active judges. Now that averages out to 48 days per active circuit court judge. Subtracting that 575 days from the total of 911, you then have 336 judge-sitting days that were furnished by these active district court judges, senior district court judges, senior circuit court judges, and visiting judges from outside the ninth circuit. If one were to divide that 336 days by the 48 days of average sittings by an active judge you would then have exactly the equivalent of seven full-time judges. So that in the year 1973 the ninth circuit operated with 12 active judges, plus that equivalent help. In effect, it operated as a 19-judge court.

Judge KILKENNY. No question about it.

Mr. WESTPHAL. Now, then, exactly when did Judge Sneed come on board?

Judge KILKENNY. In August 1973.

Mr. WESTPHAL. He has been through his shakedown cruise and has been of active help to you for a full year?

Judge KILKENNY. That is right.

Mr. WESTPHAL. Of course, with Judge Sneed in there, and assuming you are calling in the same number of district judges that you did before, the equivalent judgeship strength would be up to a total bench of approximately 20?

Judge KILKENNY. Correct.

Mr. WESTPHAL. So that for some years now the ninth circuit has, by extensive use—I think you used the word massive use—of district court judges, been operating with an equivalent bench strength of some 18, 19, or 20 judges?

Judge KILKENNY. Well, I would say "Yes," but I would want to modify that, if I might, right at this moment. When you are operating with district judges and with outside judges, you are not operating with full efficiency.

Mr. WESTPHAL. As a matter of fact, none of those visiting judges participate in other functions of the court. They do not participate in any en banc proceedings; they do not participate in any council matters; they do not participate or serve on any internal committees. In short, they do not participate as a full-time circuit judge?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. In any event, during the last several years, when the court has had an equivalent bench strength of some 18 to 20 judges, we come down to 1974, and we find that, even though that court has had this equivalent bench strength of up to 20 judges, that court of 20 judges is just not able to keep up with the filings, which in 1974 increased some 16 percent above 1973. As a result, Judge Duniway, in his testimony the other day, told us that, as of September 24, 1974, there were 601 cases that had been fully briefed but had not been placed upon any argument calendar of the court. Also as of June 30, 1974, the end of fiscal year 1974, in the Nation as a whole, from all the circuits, there were 291 cases which had been under consideration for over 3 months. Of that 291, 62 of them were in the ninth circuit. Included in that group of 291 cases there were some 80 cases in the Nation as a whole in consideration for over 6 months, and 19 of that 80 were in the ninth circuit. Also in the Nation as a whole there were 22 cases that had been under consideration by the various circuit courts for over 9 months, and of that 22, 9 of those cases were in the ninth circuit. Similarly, according to this Administrative Office exhibit which is published, I take it, in their annual report, in the Nation as a whole there were 14 cases pending before circuit courts for over 1 year, and 6 of those were in the ninth circuit.

Now, would you agree that those figures paint a picture of the result of the difficulties with which your court has been struggling over the past several years in trying to meet this virtually overwhelming influx of cases?

Judge KILKENNY. I believe the figures are deceptive. Once we fell behind, as I say, in 1970 I believe it was—I do have the figures some place, but I don't have them right before me—once we fell substantially behind, when we should have had 13 judges and didn't have those 13 judges, and fell substantially behind, why, the caseload each year has been increasing without additional judges, and we just haven't been able to catch up on the cases.

If you would take—I think there was some figure of 543, I believe, which is used in some of your statistics—if you would take a year and a half that we are behind, and have been behind ever since the four judges were authorized, and then subtract a year and a half's caseload from the 543, you would come up with just about what is the average caseload in the United States.

Now, with reference to the cases that are a year old, and the substantial number which are almost a year old, I think that might happen through one or two judges out of an entire group. Even one judge could be the main factor in that delinquency. One judge can get involved and get behind where he has two or three very difficult cases. The same thing can happen to another judge. I think possibly that the Administrative Office has better information than I have on the 12-month-old cases. We know all judges are not capable of the same amount of work. I say this—and I certainly don't say it in an immodest manner—I have been on the court of appeals for over 5 years, sometimes in senior status, and I have never had a case that hasn't been disposed of in less than 3 months. The work habits of a judge have so much to do with this. Moreover we might be unfortunate in the selection of some of our district judges who have visited or possibly one or more of our active judges, but I don't think the court as a whole should be condemned for the delinquency.

Mr. WESTPHAL. There is no intent by anyone to condemn the 13 judges and all the senior judges of the ninth circuit, or any of the judges. Nobody is attempting to condemn them. They have tried their very best during this period of time to keep up with this ever-increasing caseload.

You have suggested that these figures that I mention may be deceptive. You have suggested that the backlog has a direct correlation to being a year and a half behind which occurred before you got these positions filled. You told us that Judge Hufstедler was appointed pretty promptly but that it was 1970 before all four of those judges came on board.

I would just call your attention to this: according to committee exhibit A-2, a copy of which is on the table in front of you, as of 1971, on June 30, the end of the fiscal year, there were 1,743 cases pending, and in this intervening 4 years, during which time you had all 13 judges—

Judge KILKENNY. No we didn't, counsel. I have spoken of the vacancies. Judge Hamley was out for 2 years, and he was ill.

Mr. WESTPHAL. Those vacancies were more than replaced by the visiting judges or assigned judges that you have called in.

Judge KILKENNY. I would agree with that.

Mr. WESTPHAL. In exhibit A-2, running from 1971 to 1974, the backlog of the cases pending has increased from 1,743 to 2,355, an additional 823 cases. So I would suggest—

Judge KILKENNY. Of cases pending, backlog?

Mr. WESTPHAL. Yes.

Judge KILKENNY. Backlog? 2,300 backlog?

Mr. WESTPHAL. The committee exhibit shows the total number of cases pending as of June 30, 1974.

Judge KILKENNY. Pending, yes, correct, right.

Mr. WESTPHAL. Now, of course, the point you are making is that not all of those can be classified as backlog, because any time you stop something in midstream there are a certain number of cases that are in various stages of the appellate process. But nevertheless, the figures show that for each and every one of the last 4 years this court, whether it be 18 or 19 or 20 equivalent judgeships, has been unable to come any closer than an average of terminating about 200 cases less than those which are on file each and every year.

Judge KILKENNY. If you would take hold of the additional filings during that period of time I still think my statistical statement is correct. It would more than match the increase in the pending cases.

Mr. WESTPHAL. Judge, I have the feeling that as I ask these questions, not only have you, but Judge Duniway and others, have seemed to feel that we are trying to make an attack upon the judges' industry and their efforts to keep up with the caseload. That isn't it at all, Judge.

Judge KILKENNY. I hope that I am not giving that impression. The mere fact that there might be a bit of Irish blood in my veins may cause me to raise up here and there, but I have no intention of giving that impression at all.

Mr. WESTPHAL. I understand that this so-called delay in the civil cases, to which you yourself referred, runs about a year and a half. The fact that there are some 601 cases that haven't been calendared for oral argument causes the court itself, when it finally does schedule a case for oral argument, to encourage counsel to submit to the court any additional precedents or controlling cases which may have been handed down in the interval between the time counsel filed their last briefs and the time they appear for oral argument. Isn't that evidence that the court itself recognizes the delay?

Judge KILKENNY. That didn't apply to just civil cases. That was a general order in the run-of-the-mill criminal cases, too. The court didn't do that for the purpose of bringing an 18-month delay up to date. It was a fine thing to do, but the general order was for the criminal and the civil calendar both.

Mr. WESTPHAL. I am not implying it was civil only, although I said that. Even if it applies to all of them, this more or less confirms that testimony, which was given by civil lawyers during the hearings held by the Hruska commission on the west coast, to the effect that there is so much delay between the time they file their last brief and the time they finally appear for oral argument that they virtually have to rebrief their case.

Judge KILKENNY. Of course, I don't think there is any validity to that case, counsel. Even if it were normally a 6-month delay, counsel is not doing his job if he doesn't rebrief and bring it up to date.

Mr. WESTPHAL. There is another facet of the present procedures in the ninth circuit under which you are forced to operate in order to keep up with this caseload and that is this massive use of district court judges. It has been suggested to the subcommittee that this is not a practice that you should be encouraged to exercise for too long for two reasons: First, many of the district courts in the ninth circuit have caseload problems of their own, and their judges' time could be better spent working at home to reduce their own caseloads rather than spent furnishing time on assignment to sit on panels in the ninth circuit.

And the second point that is involved is that the bar itself seems to have some feelings against having a district court judge sit on virtually every panel. There is also that fact—that has been described to us by Judge Duniway—that when a district court judge is a member of the panel, whether he draws that opinion on assignment or not, that district court judge is not quite up to date on what the case law of the ninth circuit is and that frequently results in some 2 to 1 decisions. Frequently it results in the necessity of en banc cases, because a panel has gone off in different directions than some other panel has. Have you any observations to make on that?

Judge KILKENNY. I have.

With reference to your first statement, I have no quarrel with that. District judges should not be sitting on the circuit except once in a while to acquaint themselves with what goes on on the circuit court. I know, Mr. Chairman and counsel, that if we had enough circuit judges there would be no district judges sitting on the ninth circuit, and that is the answer. It is just the complete answer to it.

On the second point, I in part at least agree with Judge Duniway. I think that is the reason why district judges shouldn't sit with regularity. If the other two members of the panel are in favor of reversing a district judge, there may be a reticence on the part of the sitting district judge to go along.

Mr. WESTPHAL. They are only human like the rest of us.

Judge KILKENNY. Well, after all, they have their district judges association, and have many other contacts. A visiting judge on a case wouldn't be from the same court, because we try to avoid that. We do avoid that. Still, he certainly is acquainted with his fellow judges. He is acquainted with them. He is acquainted with the district court problems. That does happen, but I don't think that it happens too often, because generally there is agreement on the panel. Once in a while, however, a district judge has been quite reluctant to go along with the majority.

I am not recommending against the occasional use of district judges at the circuit court level. I am just saying it is an emergency measure. If we hadn't used them, I think you can imagine what condition the ninth circuit would be in at the present time.

Mr. WESTPHAL. So I take it we are in substantial agreement that the problem—whatever dimensions you place upon that problem—can be solved only by finding a way to employ more circuit judge power to the caseload of the ninth circuit?

Judge KILKENNY. I would put it this way: the simple way of stating it is that we need more judges, period. Now, the question is can we properly employ the power of the judges on an 18- or 21-man court? I guess that that is what the committee must decide. Personally, I believe we can do it.

Mr. WESTPHAL. Very good.

So now what we are down to is the fact that, as a means of employing a sufficient amount of judge power to the resolution of this problem, we have before us two principle proposals. I understand that when Mr. Petrie testifies we may have many more proposals, but as of this time we have two principle proposed solutions. One is a solution, proposed by the so-called Hruska commission, which would place the southern and central districts of California, Arizona, and Nevada into a new

12th circuit, and the balance of the present ninth circuit would retain the designation ninth circuit but in effect it would be a new ninth circuit.

The other alternative is one that you suggested to the committee here in your statement, which is that the existing ninth circuit be divided into two divisions, a southern division and a northern division. The southern division you propose would be one which would consist of the southern and central districts of California and the State of Arizona. Your northern division would have the State of Nevada included in it plus all the other remaining districts of the present ninth circuit.

Judge KILKENNY. Yes.

Mr. WESTPHAL. So that basically, as far as geography is concerned, the only difference in your alignment and the recommendation of the Hruska commission is with respect to where the State of Nevada would be placed?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. All right.

Now, under the Hruska commission proposal this twelfth circuit would have, according to 1974 filings, a total incoming caseload of 1,545 cases. Under your proposal it would have a caseload of 1,417. Again, according to the 1974 filings, the balance of the circuit, or what you refer to as a northern division—and what the Hruska commission refers to as a new ninth circuit—would have total filing of 1,150 and yours would have 1,278. Your suggested alignment comes closer, by virtue of changing Nevada's 128 filings, to some numerical equality than does the Hruska commission proposal?

Judge KILKENNY. Yes.

Mr. WESTPHAL. Speaking again in that frame of reference, which is geographic, and attempting to equalize the caseload, your suggestion would more closely equalize the caseload by making a different placement of Nevada in the scheme of things?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. One of the things that you also suggest is that this northern division would sit in Portland, Seattle, Honolulu, and San Francisco. As far as the northern Nevada litigants and lawyers, who are in an area adjacent to the northern part of the State of California, are concerned, they would be arguing their appeals in the same place they always had argued them?

Judge KILKENNY. That is right.

Mr. WESTPHAL. But lawyers from the southern part of Nevada would then go to San Francisco rather than Los Angeles, under your proposal?

Judge KILKENNY. Right.

Mr. WESTPHAL. Unless their case was calendared to be heard by a panel which was sitting at Portland or Seattle?

Judge KILKENNY. Which seldom would happen.

Mr. WESTPHAL. All right.

Moving on now to other areas of difference between your suggestion and the Hruska commission proposal, your suggestion is that the two divisions, the northern and southern divisions of the ninth circuit, would continue to have a chief judge presiding as the only chief judge over both the northern and southern divisions.

Judge KILKENNY. Correct.

Mr. WESTPHAL. Whereas, the Hruska proposal would have a chief judge for the twelfth circuit and a chief judge for the new ninth circuit?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. I assume that the incumbent chief judge of the ninth circuit, by virtue of his seniority, would be the chief judge of what the Hruska commission calls the twelfth circuit, as well as by virtue of his being a resident of the twelfth circuit?

Judge KILKENNY. Frankly, I just wouldn't hazard a guess on that, counsel.

Mr. WESTPHAL. What you are saying is that, in the event you regard him as a resident of the South, he might be chief judge of the new twelfth circuit?

Judge KILKENNY. He may be.

Mr. WESTPHAL. You would also have a division chief judge, who would really not be a "chief judge" within the contemplation of the Federal statutes assigning duties and authority to a chief judge, but this division chief judge would be more or less an effective presiding judge or administrative chief judge?

Judge KILKENNY. I would say that is correct. Of course, the Congress would probably—I haven't reached that point in the proposed legislation—but the Congress would probably leave it to the circuit to set that up by rule, or the Congress itself could pass the legislation which would define the duties of the chiefs within the divisions.

Mr. WESTPHAL. Really, then, on that particular point, the difference between what you suggest to the subcommittee and what Senator Hruska's commission has suggested and recommended is only a difference of how the chief judge authority specified by the Federal statute should be exercised over these two geographical groups?

Judge KILKENNY. Essentially, I think that is correct, counsel. Without giving deep thought to it, I would say that is correct.

Mr. WESTPHAL. Now, the Hruska Commission's proposal is a little bit different geographically from yours and a little bit different from yours as far as this chief judge question is concerned. Where you have two separate circuits, if there should be a conflict between a decision in the ninth circuit and one in the twelfth circuit on a point of federal law, that conflict would be resolved by the Supreme Court of the United States, just as they would resolve a conflict between the ninth circuit and the sixth circuit if they recognized it as a conflict which needed resolving today?

Judge KILKENNY. That is right.

Mr. WESTPHAL. But under your proposal, where you would not denominate them as circuits but would denominate them as separate divisions with essentially the same geographical lines, you would resolve any conflict between the divisions by a special en banc procedure of having four judges from the northern division sit with four judges of the southern division, and this chief judge would join them to be a ninth member of this en banc panel?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. So that in effect your suggestion is that we use this four plus four plus one en banc procedure as a means of reconciling any intracircuit conflicts that might arise.

Judge KILKENNY. Correct.

Mr. WESTPHAL. But at the present time, and for the last several years, the ninth circuit has had this same number of judges, about 19 or 20. They have also developed intracircuit conflicts between three judge panels, and we have received testimony, Judge, that there has been some difficulty in composing an en banc panel of 13 judges in order to resolve those intracircuit conflicts. Why is it that you think your new concept of northern and southern divisions, employing a four plus four plus one formula, could more readily resolve these intracircuit conflicts than the existing circuit has over the last 3 or 4 years?

Judge KILKENNY. Well, for one thing, you only have the 9 judges with whom you must deal, rather than the 13 active judges. I might say there have only been 13 active judges for a few months during 1970 and since Judge Sneed was appointed in 1973. But, in any event, there has been difficulty finding space for 13 judges at times. The chief generally places en banc hearings for the court and council meetings on the calendar for San Francisco on the Wednesday of the week in which the court meets there. Sometimes a judge who is not sitting during that particular week may have to make a special trip. They have had some problems getting all 13 judges together, but with nine judges you wouldn't have that problem. At least you would have no more problem there than you would with nine judges on any other circuit similar to the ninth circuit where they are located in various quarters.

Mr. WESTPHAL. I have one other point that I would like to clear up, Judge.

In your prepared statement, regarding your proposed realignment into northern and southern divisions you state that the first chief judge could be appointed by carryover from the present circuit, with tenure as provided by law, "his successor to be selected by the Chief Justice from the active judges of both divisions, the vacancy to be filled by the President." I take it you refer to the Chief Justice of the United States.

For what reason do you suggest that a chief judge be designated by the Chief Justice of the United States and appointed by the President, rather than having the chief judge position filled as it normally is now?

Judge KILKENNY. Well, it is a personal viewpoint, counsel. I would prefer to see the Chief Justice of the United States appoint, from the members of the circuit, the chief judge who would preside over both divisions. My reason for it, and I think that it is a good reason, is that some judges in that circuit would be much better qualified to serve as a chief than an at-large appointment by the President of the United States where the chief judge wouldn't necessarily have to be from the ninth circuit at all.

Mr. WESTPHAL. I see.

Under the existing system the chief judge goes by appointment of seniority among the active judges.

Judge KILKENNY. Correct.

Mr. WESTPHAL. There have been people, in years past, who have suggested that that should not be the fact, because, in truth and in fact, there are some judges on any circuit who are better qualified to be the administrative and operating head and chief judge of a circuit

rather than he who just happens to come along by the process of seniority. So what your suggestion does is, in effect, recognize what some people have said for a number of years?

Judge KILKENNY. There would be something to that, yes.

Mr. WESTPHAL. I thank you, Judge. I think that this dialog has helped us to sharpen the difference that may exist between the Hruska Commission and your position.

I have one further question.

You said at the outset that you and Chief Judge Chambers don't necessarily agree on everything that you are presenting to the subcommittee today, but it has been my understanding that what you have presented as a geographical plan and division nomenclature is basically something that Judge Chambers adheres to.

Judge KILKENNY. I believe you can say that, although I would prefer to use Judge Chamber's language, which he employed in his letter to you, Mr. Westphal. I believe that I reflect some of his views, and I would prefer to leave it that way.

Mr. WESTPHAL. All right. Thank you, Judge Kilkenney.

Mr. Chairman, that is all.

Senator BURDICK. Your recommendation is to set up divisions instead of circuits?

Judge KILKENNY. Well, all I can say, I had suggested divisions in the circuit long before the Hruska Commission started splitting the circuit.

Senator BURDICK. It seems to me your divisions may be more clumsy in one respect; in the circuit system you have one chief judge, but in your division system you have two chief judges, two straw bosses.

Judge KILKENNY. You could describe it that way. You could use that nomenclature. If you have divisions, I believe that you must have an overall chief. When you create divisions along lines as suggested by the American Bar Foundation, where they may be on different types of law, such as criminal law, handled by one division or the other, I think you must have someone that you will call chief of that division. I think it would be a necessary thing on this divisional set up that has been proposed, too. I believe it is certainly worthy of consideration, gentlemen.

Senator BURDICK. Judge Kilkenney, let me thank you once again for coming to Washington today and for your very helpful contribution.

Judge KILKENNY. Thank you for giving me the privilege of appearing before you.

[EDITOR'S NOTE: Following his testimony, Judge Kilkenney sent the following letter and supplement to his testimony to the subcommittee:]

JOHN F. KILKENNY, SENIOR CIRCUIT JUDGE,
U.S. COURT OF APPEALS, NINTH CIRCUIT.
Portland, Oreg., October 7, 1974.

Mr. WILLIAM H. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR Mr. WESTPHAL: I attach original and necessary copies of a Supplement to my Oral Testimony. Hopefully, there will be no objection to the filing of this material.

Sincerely,

JOHN F. KILKENNY.

SUPPLEMENT TO ORAL TESTIMONY OF JUDGE JOHN F. KILKENNY

I neglected to mention that when we fell behind in the critical years of fiscal '71, '72 and '73, that the Ninth Circuit Senior Judges were doing substantial out-of-circuit work in exchange for the sittings in the Ninth by outside circuit judges. These assignments, of course, are directed by the Chief Justice. For example, since taking Senior Status, I have served in the First, the Second, the Seventh and the Tenth Circuits, and will again serve in the Seventh the latter part of this month. Likewise, Senior Judges Barnes and Hamley have occasionally sat in outside circuits. Considerable of Senior Judge Carter's time is consumed with his work on the Emergency Court of Appeals.

Although the termination of 2,500 cases in fiscal '74 might indicate to the contrary, I have no doubt that the substantial use of District Judges cuts down on the overall efficiency of the court. Given the same number of circuit judges in the critical years that we had of district judges, I am convinced that the civil backlog would now be close to normal. This again points to the appalling need for five or more additional circuit judgeships in the Ninth.

I failed to mention that the brilliant showing of the Fifth in keeping its calendar current might well be due, at least in substantial part, to the 15 additional law clerks and the substantial secretarial assistance received by reason of the special Congressional legislation some two or three years ago. Needless to say, I am not condemning, but, on the other hand, commending the Fifth for its "know-how" in securing this financial grant. We did not put it all together until this year and now have legislation pending, with Judicial Conference approval, which would place us on an almost equal footing with the Fifth.

The fact that a majority of the judges in the Fifth may have voted to limit to 15 the judgeships in their circuit is beside the point. Opposing that is the action of the Ninth in voting for five additional judges some two or three years ago. The only available proof is that a court in excess of 15 judges is a manageable court. We need only take a look at the performance of the Fifth with its outside and senior judges and the performance of the Ninth with its outside, senior and district judges during the past two or three fiscal years. These performances demonstrate that courts of 18 to 21 judges are manageable, even under adverse circumstances.

Another advantage of the division proposal over an outright split is the former's political feasibility. With the outright opposition of the California State Bar, and the Bars of the Cities of San Diego, Los Angeles and San Francisco, I would predict that the proposed split of California is a dream for the distant future.

On the question of a "collegial court", at the October 2nd hearing it was again suggested that the outside judges wasted considerable time in going to and from San Francisco, Los Angeles, Portland or Seattle. I neglected to say that while working in San Francisco or Los Angeles, the outside judges have the services of staff secretaries and, time after time, dictate orders, memoranda, or oft times opinions in disposition of the cases they have under consideration. Beyond that, the judges are in constant contact with their home secretaries and each day respond to all incoming mail, in addition to dictating memoranda, transmitting finalized opinions, letters and other materials which the home secretary has prepared during the judge's absence. I repeat, the time lost in air flight and in reaching or returning from the judge's destination is minimal.

Additionally, I have known of ill feeling developing between judges serving under the same roof, but I have not heard of animosity between judges who only see each other one week out of each month. Indeed, for the non-resident judge the monthly return to San Francisco or Los Angeles is in the nature of a dignified homecoming. Everyone seems delighted and the daily luncheons are truly "collegial" affairs, while the dinners with visiting judges are sources of conviviality and, at times, intellectual triumph. "Fragmentation" is a bad, bad word when used as descriptive of the activities, or judicial performance, of the judges of the Ninth.

Dated: October 7, 1974.

Senator BURDICK. Our next witness is Mr. Bernard Petrie, of the San Francisco Bar Association, San Francisco.

Welcome to the committee, Mr. Petrie. You may proceed in any manner you wish.

STATEMENT OF BERNARD PETRIE, SAN FRANCISCO BAR
ASSOCIATION, SAN FRANCISCO, CALIF.

Mr. PETRIE. Mr. Chairman, Mr. Westphal, my name is Bernard Petrie. I am a San Francisco lawyer and spokesman for the Bar Association of San Francisco.

We appreciate very much, Mr. Chairman, this chance to present our views.

The Bar Association of San Francisco has about 4,400 members and is 102 years old. I served as chairman of a special committee of the association to review the report of the Commission on Revision of the Federal Court Appellate System. Our committee has 10 members with diverse and substantial Federal trial and appellate experience. With your permission, Mr. Chairman, I would like to file a copy of our report. I have supplied several copies to the committee.

Senator BURDICK. It will be received.

[Committee insert.]

REPORT
of the
SPECIAL COMMITTEE OF THE BAR ASSOCIATION OF SAN FRANCISCO
TO REVIEW REPORT OF THE COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM

July 15, 1974

Approved by the Board of Directors
of the
BAR ASSOCIATION OF SAN FRANCISCO

July 24, 1974

Committee Members

Bernard Petrie, Chairman
Jerome I. Braun
Frederick P. Furth
John T. Hansen
James F. Hewitt
Charles A. Legge
Matthew P. Mitchell
David C. Moon
Cecil F. Poole
Noble K. Gregory

Dissenting

Noble K. Gregory

7/15/74

Report to the Board of Directors of The Bar Association of San Francisco by its Special Committee to Study the Recommendation of the Commission on Revision of the Federal Court Appellate System for a Change in the Boundaries of the Ninth Judicial Circuit.

BACKGROUND

In 1972 the Ninety-Second Congress by Public Law No. 489 created the Commission on Revision of the Federal Court Appellate System (the Commission). The Congress directed the Commission to study first "the present division of the United States into the several judicial circuits" and to recommend "changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business". Sixteen members* formed the Commission, appointed four each by the President, Chief Justice, Senate and House of Representatives. The Commission held hearings in many cities and submitted its report on December 18, 1973.

The increasing caseload in the circuit courts of appeal prompted the study. The Commission focused on the circuits with the greatest caseloads and the most judges, the Fifth and the Ninth. The report recommends a division of each of these circuits into two new circuits. The present Ninth Circuit would be divided into a new Ninth Circuit consisting of the Northern and Eastern Districts of California and the states of Alaska, Washington, Oregon, Idaho, Montana and Hawaii, and Guam, and a new Twelfth Circuit consisting of the Southern and Central Districts of California and Arizona and Nevada.

Senator Burdick, a member of the Commission, introduced bills on February 7, 1974 (S.2988-91) to carry out the Commission's recommendations. The bills were referred to the Committee on the Judiciary. It is expected that hearings will be held in the late summer or fall. Subcommittees on Improvements of Judicial Machinery (chaired by Senator Burdick) and Representation of Citizens Interests (chaired by Senator Tunney) as well as the Executive Director of the Commission, Professor A. Leo Levin, have asked for the views of The Bar Association of the City of San Francisco.

This Special Committee (the Committee) was appointed on February 13, 1974, and has had several meetings. It has reviewed the statements filed with the Commission and digests of testimony before the Commission by judges and lawyers from the Ninth Circuit as well as other materials, including certain statistical material on filings in the Ninth Circuit and its districts courts and a Statement of the State Bar of California to the Commission dated December 5, 1973.

The Committee deems the recommended division of the Ninth Circuit to be premature and, in any event, a partial solution. If the Ninth Circuit is divided, California need not and should not be split.

* Senators: Quentin N. Burdick, Edward J. Gurney, Roman L. Hruska, John L. McClellan; Congressmen: Jack Brooks, Walter Flowers, Edward Hutchinson, Charles E. Wiggins; Honorable Emanuel Celler; Dean Roger C. Cramton; Francis R. Kirkham, Esq.; Judge Alfred T. Sulmonetti; Judge J. Edward Lombard; Judge Roger Robb; Bernard G. Segal, Esq.; Professor Herbert Wechsler.

DISCUSSION

This is a time of ferment of ideas to grapple with increasing federal appellate caseloads.* Proposals such as that for a National Court of Appeals with divisions are being studied. The Committee notes that the Commission itself is engaged now in the second phase of its work to study the structure and internal procedures of the federal appeal system and to recommend such changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeal consistent with fundamental concepts of due process and fairness". The Committee feels that there are numerous ways to tackle the problem now faced by the larger circuits. Appended hereto is a list of some of the matters we believe the Commission could consider profitably. The Ninth Circuit already is being innovative in some of these areas.

The Committee is mindful that the increasing filings in the Ninth Circuit have resulted in insufficient time for judicial reflection and consistency, a much longer wait than desirable in civil cases, more per curiam orders, fewer en banc hearings, elimination of oral argument in some cases and a large backlog. The Committee unhesitatingly and unanimously joins with the Commission in finding that the need for reform is pressing. What concerns the Committee is that circuit division very well may turn out to be a fleeting solution that will divert efforts away from the real task of overhauling and honing the federal appellate system. Also, with circuit division a desirable regionalism will suffer. Some tradition will be lost. Some confusion will ensue as a new circuit strikes out on its own. The Supreme Court will be burdened further. All of these drawbacks become more serious if circuit division entails splitting California, and that act involves its own disadvantages, which are noted below.

An analysis of case filings in the Ninth Circuit to which we turn in the next section indicates that the proposed division would be premature now and probably would create a workload imbalance.

The Committee views the present large backlog in the Ninth Circuit as an urgent problem, but regards it as separate from the problem of heavy, current filings, and believes it could be reduced promptly by ad hoc panels of additional judges.

The Committee endorses the request for at least two more judges at once. Additional appellate judges will be needed whether or not the circuit is split. The Committee also endorses Judge John F. Kilkenny's plan to utilize two divisions within the present Ninth Circuit as preferable to splitting the Circuit now.

The Committee prefers that "en banc executive committees" (envisaged by such plan to consist of several fewer judges than the entire court) be selected by rotation rather than seniority. An opportunity to test out this promising plan of Judge John Kilkenny may be lost if the circuit is to become two circuits.

THE SIZE, SHAPE, AND RATE OF GROWTH OF THE NINTH CIRCUIT CASELOAD.

Underlying all of the suggestions for the division of the Ninth Circuit (or for its reorganization into two divisions) are general conceptions of the unwieldiness of the Ninth Circuit and assumptions about the rates of growth of the Ninth Circuit's business. Those assumptions and conceptions can be summarized as follows:

* It is also a time to grapple with the appellate caseload in California, where a division of the State into two court systems is not even theoretically possible. In consequence of this limitation, the recent study of the National Center for State Courts (to be published in early fall) focuses exclusively on administrative reforms, an alternative the Committee believes should be exhausted in the case of the Ninth Circuit. See text below.

1. The Ninth Circuit caseload is large in absolute terms and on a per-judge basis;
2. The caseload of the Ninth Circuit is growing rapidly;
3. The Ninth Circuit's performance has deteriorated under the weight of its caseload;

and

4. The distribution of the caseload throughout the Ninth Circuit can be determined on the basis of statistics on numbers of appeals filed from the various districts within the Ninth Circuit.

In an attempt to examine some of these assumptions (and particularly assumptions 2-4) the Committee commissioned one of its members, Matthew P. Mitchell, to examine available published statistics in an attempt to determine whether the assumptions are valid, and if not, the nature and consequences of modified assumptions supported by the statistical material examined.

Mr. Mitchell's report is attached to the original hereof as appendix. It consists of a number of tables, together with separate text material describing and analyzing those tables.

The conclusion of Mr. Mitchell's study can be summarized as follows:

A. GROWTH OF CASELOAD

The large absolute number of cases which the Ninth Circuit has handled in recent years, and the large number of cases per judge, cannot be doubted. However, at least three factors which have contributed to a very rapid growth of caseload in the '60's suggest that, while the growth has been real, the apparent rate of growth of the Ninth Circuit's caseload has greatly exceeded its long term trend. Very recent statistics for early 1974 show that the Ninth Circuit's new caseload may actually be leveling. Filings for the first five months of 1974 totaled 1,046 as against 1,037 for the comparable period of 1973. The Court terminated 1,091 cases for the first five months of 1974 compared with 965 terminations for the same period in 1973. While this phenomenon is likely to be temporary, there are reasons to believe that a "plateau" in new case filings has been reached and that it will slope gently upward for the foreseeable future.

The factors supporting this hypothesis include a very noticeable slackening in the rate of growth of the population at large in the geographic area comprising the Ninth Circuit. While the Ninth Circuit has not yet achieved zero population growth, its population is now growing at a rate of less than 1-1/2% per year - far less rapidly than it grew in the '40's, '50's and '60's.

Two changes in procedural rules occurred during the '60's which may have substantially increased the propensity for losing litigants to appeal. First of these was the passage of the Criminal Justice Act of 1964 providing for the compensation of attorneys appointed to represent indigent defendants. The statistics strongly suggest that this change in the law has substantially increased both the number of criminal cases tried at the district court level and the number of criminal cases appealed to circuit courts in the United States. This phenomenon is nationwide.

In addition, "barriers to entry" have been reduced by changes in the Ninth Circuit rules (in part through the Federal Rules of Appellate Procedure) eliminating the requirement of printed briefs and a printed record and otherwise reducing the cost of an appeal to all litigants. No statistics have been found to verify this phenomenon, but to the extent that it has increased the rate of appeal during the '60's, the impact of this change has probably already been felt.

Finally, there is some statistical support for the proposition that high interest rates in the economy at large are reflected in an increased propensity for civil damage judgment debtors to appeal

the adverse judgments upon pain of payment or relatively modest statutory rates of interest if their judgments are affirmed on appeal. Whether or not this is a significant factor is hard to determine. Perhaps a desire to postpone payment of utilizable capital funds at a relatively light interest is at work. Again, this phenomenon (to the extent that it is suggested by the numbers) is nationwide.

The Ninth Circuit's share of the work done by the circuits has been increasing in recent years. However, this trend may also be leveling off. In 1960-1961, the Ninth Circuit received about 11% of the new filings in all circuits. That figure grew to something over 15% in the years 1971-73, but fell off slightly (to 14.8%) in fiscal 1973.

A significant amount of the growth in filings which the Ninth Circuit has experienced over about the last decade has been in the area of selective service appeals and appeals in narcotics cases. However, the trend has already reversed itself insofar as the selective service appeals are concerned. Those appeals apparently peaked at 152 filings in fiscal 1972. They peaked in fiscal 1970 when considered as a percentage of criminal appeals (they amounted to 22.8% of the criminal appeals filed in that fiscal year). The selective service cases amounted to 8.9% of all appeals filed in both fiscal 1970 and fiscal 1971 and lower percentages in later years. In fiscal 1973 the selective service appeals dropped off by any measure - absolute number of filings, as a percentage of criminal appeals filed, and as a percentage of all appeals filed. It may be confidently predicted that the selective service appeals caseload will rapidly dwindle to insignificance.

By contrast, the narcotics appeals caseload is large, and has been growing especially rapidly since fiscal 1970. This growth has been apparent in terms of absolute numbers of narcotics appeals taken, narcotics appeals as a percentage of all criminal appeals, and narcotics appeals as a percentage of all appeals in general.

In fiscal 1973, narcotics appeals comprised 28.5% of criminal appeals taken to all circuits and 9.5% of all appeals of every kind. In the Ninth Circuit, by contrast, narcotics appeals have risen, in fiscal 1973, to 46.2% of the criminal appeals caseload and an even 20% of all appeals taken to the Ninth Circuit in that fiscal year.

Narcotics appeals are, in other words, a large and rapidly growing portion of the Ninth Circuit caseload by any measure. An accurate prediction of the future growth or shrinkage in the narcotics caseload would help considerably in predicting the future rate or growth of the Ninth Circuit caseload.

B. THE NINTH CIRCUIT'S PERFORMANCE

The Administrative Office of the United States Courts has maintained rather complete records on the time taken by circuit courts to dispose of cases. The most recent full year's statistics available show that the Ninth Circuit is slightly faster than all circuits collectively in disposing of criminal cases but significantly slower in disposing of civil cases.

In each instance, however, the Ninth Circuit did significantly better in the fiscal years ended on June 30, 1971, 1972 and 1973 than it did in the years ending June 30, 1961, 1962, and 1963. Indeed, the Ninth Circuit's performance in fiscal 1973 in disposing of its criminal caseload was better than in the year 1961 or any year since. The Ninth Circuit's performance in disposing of civil cases in fiscal 1973 was better than 1961 and eight intervening years, but worse than its performance in 1965, 1966, 1967 and 1970.

In other words, the available statistics do not support any assertion that the Ninth Circuit's performance in disposing of its cases has deteriorated during a decade or so of rapid growth.

C. DISTRIBUTION OF THE NINTH CIRCUIT'S CASELOAD

One would expect to find that cases of various types are not uniformly distributed throughout the district courts within the Ninth Circuit. One would also anticipate that the percentages of cases appealed from district courts vary somewhat by type of case. The statistics bear this out.

Uneven dispersion of various types of cases among the districts within the Ninth Circuit creates several problems which must be solved in connection with any planned reorganization of the circuit. Prediction of rates of growth of caseload depends upon the types of cases included in that caseload. For example, a caseload consisting mainly of criminal selective service cases is likely to decline rapidly in the foreseeable future. Conversely, if present trends continue, a caseload consisting largely of criminal narcotics cases will continue to grow explosively. Reasonably accurate growth predictions are necessary if new circuits are to be properly staffed.

The type of caseload handled by a circuit court may even influence the willingness of prospective judges to accept appointment to the bench - few lawyers are likely to be "turned on" by the prospect of reviewing an endless array of search and seizure cases involving narcotics.

Available statistics suggest substantial problems inherent in the present proposal for division of the Ninth Circuit as a result of uneven distribution of the sources of that caseload among the district courts of the present Ninth Circuit. The statistics available on this subject are imperfect because no published statistics showing appeals by type of case by district are presently available.*

Considering district court statistics on cases commenced, it appears that the proposed new Twelfth Circuit would carry a far heavier burden in narcotics cases than would the proposed New Ninth Circuit. While the proportion of narcotics cases to all criminal cases in district courts is substantially above the national norm in the present Ninth Circuit, the district courts of the proposed New Ninth Circuit are well below the national norm and the district courts of the Proposed New Twelfth Circuit substantially above. Thus, if narcotics cases are appealed with about the same frequency in all districts, a disproportionate share of this important part of the caseload will go to the New Twelfth Circuit.

With selective service cases, the pattern is reversed. That is, the district courts in the Ninth Circuit have consistently handled an unusually high proportion of selective service cases in their criminal caseload. This imbalance is due, however, almost entirely to the district courts within the area of the proposed New Ninth Circuit; the district courts of the New Twelfth Circuit have handled a selective service caseload only slightly above the national average.

However, district courts of the proposed New Ninth Circuit have handled a high percentage of selective service cases. In fiscal 1971, selective service cases comprised 23.1% of their criminal caseload versus a national average of 11%. In 1972, the percentage was even higher, with selective service cases comprising 27.2% of the criminal caseload in district courts within the proposed New Ninth Circuit as against a national average of 10.9% in that year.

Any division of the present Ninth Circuit into two new circuits, staffed in proportion to raw appellate filings of the last few years, will likely produce substantial imbalance in the workload of

* The Administrative Office of the United States Courts has the necessary information in its data bank, but has not as yet programmed its computer to identify Ninth Circuit appeals by type of case, by district from which they have risen. The Administrative Office should be encouraged to do the necessary statistical work to determine accurately the sources of cases of various types which the proposed new circuits will be expected to handle.

judges in those circuits as the large bulge of selective service cases lightens the load of the proposed New Ninth Circuit and the disproportionate increase in narcotics cases increases the load upon the proposed New Twelfth Circuit.

D. "WEIGHTING" OF THE APPELLATE CASELOAD BY TYPE OF CASE

No statistical information has been developed for the Committee on the relative difficulty of various types of cases once they reach the circuit court level. Built-in limitations on the length of briefs, length of oral argument, and the limited objectives sought by the appellant (i.e. one reversible error is enough) tend to reduce all appellate cases to a common denominator.

However, intuition suggests that appellate courts do consistently find some cases more difficult than others.

The only empirical study on this subject, as far as we know, is a self-imposed time and motion study done by some of the judges and law clerks of the Third Circuit. It is not sufficiently detailed to provide much help except that it does indicate that civil cases take twice as much judicial time as criminal cases.

In order to fairly assess the relative difficulty of the "average" case expected to arise in a proposed circuit, better information on the relative difficulty of handling cases at the appellate level would be required. In the absence of such information, one type of case nevertheless bears mention in connection with the Ninth Circuit: The private civil antitrust action, of which the Ninth Circuit handles a disproportionate number of appeals. In fiscal 1973, 9.7% of all private civil cases appealed to the Ninth Circuit were antitrust actions. That amounted to 3.5% of total appeals to the Ninth Circuit. In the same year, private antitrust appeals amounted only to 3% of the private cases in all circuits and only 1.4% of total appeals.

Even at 3.5% of the total appeals, antitrust cases do not bulk numerically large in the Ninth Circuit's appellate caseload. Assuming, however, that they represent an uncommonly difficult type of case for the Circuit to review, it is important to know how these cases would be distributed following a division of the present Ninth Circuit into the proposed New Ninth and Twelfth Circuits.

For the fiscal year ended June 30, 1972, 201 private antitrust cases arose in the districts within the proposed new Ninth Circuit as against only 126 in the larger proposed New Twelfth Circuit, or about 61.5% in the area of the proposed New Ninth Circuit and 38.5% in the area of the proposed new Twelfth Circuit. Based upon all filings, the proposed new Twelfth Circuit should take over about 55% of the business of the present Ninth Circuit, leaving 45% for the proposed New Ninth Circuit. Private antitrust cases are thus disproportionately concentrated in the proposed New Ninth Circuit.

E. CONCLUSIONS

The statistics in Mr. Mitchell's report support two conclusions. First, present trends of growth in the Ninth Circuit's caseload suggest the existence of at least a temporary pause in the rate of growth sufficient to permit a careful analysis of caseload sources and trends before a final decision is reached. Second, a detailed analysis of the present Ninth Circuit's caseload should be undertaken before any final decision on how to divide the Ninth Circuit is made.

Presently available information suggests that the Administrative Office of the United States Court, could develop extremely useful information from unpublished sources available to it. This Committee recommends that the development of such statistical information by the Administrative Office of the United States Court be encouraged.

The Proposed Split of California.

If and when it is determined that the Circuit should be divided, the Committee recommends that every effort be made to keep California intact.

The main reason advanced to require placing the districts of California in different circuits is the fact that California contributes about two-thirds of the filings. (In Fiscal 1973, 1,543 filings out of 2,316.) Articulate spokesmen favoring the division of California argue that California's filings alone would require more than nine judges at the start and that the caseload soon would be unmanageable. The Committee has given, it believes, due weight to these numbers, i.e., the assumed optimal number of nine judges per circuit and a desirable number of average filings per judge. However, it is concerned that the solution offered has too many drawbacks.

There are several serious objections to dividing California: (1) the potential of conflicting judgments or orders; (2) the potential of inconsistent rulings on California law; (3) resultant increased forum shopping; (4) added burden on the Bar of California to master a second body of appellate decisions and a second set of appellate rules, with increased expense to clients as well as increased uncertainty for them; (5) psychological basis for an unproductive north-south polarization; and (6) anticipated adverse reaction and resistance from the bulk of the bar of California.

We have considered carefully the study of the Commission's staff entitled *Legal Problems of Dividing A State Between Two Federal Judicial Circuits* (October, 1973), which deals especially with objections (1) through (3). The view of the staff, adopted by the Commission in its report, is that existing and possible devices would go far towards alleviating, if not eliminating, any such problems. These mechanisms are: (a) transfer of cases between courts of appeal; (b) transfer of venue between district courts; (c) consolidation of multi-district litigation for trial as well as pre-trial; (d) injunction; (e) stay; (f) service outside district; (g) interpleader; and (h) certification to the California Supreme Court. The Committee remains unconvinced that these existing mechanisms, which were designed for different purposes (e.g. transfer under 28 U.S.C. 1404(a) for the convenience of parties and witnesses), would work well enough. What is proposed is moving litigants or at least preventing them from proceeding in courts chosen by them, never a happy task even in the situations for which they were enacted. A lot of judicial time would be used to try to anticipate and obviate conflicts and contradictions at the trial and appellate level. Even one or a few glaring instances of contradictory orders (e.g. in the welfare or prison field) might bring the judicial system into disrepute.

Contradictory rulings and inconsistent interpretations of state law may pose real dilemmas for officers of business and government in California. There is the recent example of inconsistent rulings between district courts in San Diego and San Francisco regarding the availability and legality of repossession by self-help. If such opposing rulings were handed down by two circuits within the State of California it would be more difficult for banks and other businesses to operate. Such inconsistent rulings might amount to a denial of equal protection of the laws. To obviate or minimize inconsistent interpretations of California law the Commission has suggested a certification to the California Supreme Court under legislation similar to that adopted in Florida and other states. The Committee has some concern that a California constitutional amendment might be required to validate any such law because the California Supreme Court is prohibited from rendering advisory opinions.

The bills introduced by Senator Burdick provide (Section 7) for appeal to the Supreme Court of the United States of a case invalidating a state law or administrative order under the Constitution, treaties or laws of the United States whenever a court of appeals certifies that its decision conflicts with that of another court of appeals with respect to the same statute or administrative order. The provision is designed, of course, to resolve conflicts between the new ninth and twelfth circuits arising from the bifurcation of California. Resolution of conflict, of course, is imperative. In this case, however, it would add to the burdens of the Supreme Court, which is striving to cope with its increasing caseload. Moreover, until that Court acted, California officials would be in a quandary.

The larger question of the future of the federal appellate system should be faced first.

Federal governmental units should be designed to embrace and not to split states. The numbers argument for splitting California works almost as well to split the state of New York (and, indeed, the City of New York) in a division of the Second Circuit. If 1,700 filings are too many for a circuit court to handle, (i.e., 150 in excess of California's 1550) the Second Circuit (and New York City) should be divided. And soon also the Fourth. Fragmentation of circuits, of course, would mean additional burdens for the Supreme Court of the United States and dilute regionalism. These splits might be obviated or alleviated, if the proposed national court of appeals or similar body were created. Our point is that a conscious choice should be made overall and for the long term, between fragmenting circuits on the one hand, and alternatives on the other, such as more judges per circuit, the creation of divisions within circuits, and administrative and jurisdictional reforms. This choice should be made deliberately before the division of California is even considered. A division of California prejudices important questions that should be faced and answered.

In this connection, we note that the Commission considered and rejected a revision of the boundaries of the Second Circuit after hearing the vigorous opposition of the Committee on Federal Courts of the Association of the Bar of the City of New York. (See the statement of that committee by its chairman appended hereto.) The only division of the Second Circuit, it was argued, that would have made sense statistically would have resulted in putting the Southern (Manhattan) and Eastern (Brooklyn) Districts into different circuits. Thus, it can be seen that numbers and statistics can almost be made to prevail over common sense.

Many, if not most, California lawyers would be hostile to division of the state. While a subcommittee of three of the Federal Courts and Practice Committee of the Los Angeles County Bar Association felt a division of California was feasible, the committee as a whole was overwhelmingly against such a division. And the chairman of the subcommittee, anticipating such resistance, wrote a concurring report which presented several alternative proposals for keeping California intact and contributed to our thinking. While there may be more sentiment in Southern California to keep the state intact, probably a majority of the lawyers in Northern California would also oppose dividing the state. This attitude of the Bar, reinforced as it is by conscientious study of the issues by some of its experienced representatives, might be important to the successful functioning of the new circuits. If California is kept intact, maximum cooperation from the Bar could be expected.

The Committee has serious concern that a division of California would interfere with the present, effective co-operation among private and governmental legal officers in California. For example, the United States Attorneys from the various districts of California now attend circuit conferences, which facilitates liaison among them. Also, organizations offering legal assistance to low income groups have offices both in Los Angeles and in San Francisco, operating as statewide law firms. A division of the state, we believe, would disrupt this co-operation at a time when a great increase in the use of the legal profession by the lower middle class is foreseen.

Resistance from the Bar is grounded in part on the added burden of a second group of appellate decisions and rules. There are relatively few California lawyers who practice in several circuits. Relatively few also are able to or need to follow the law of several circuits. It would be burdensome in time and energy for the rest of the California lawyers were the state to be split, and the burdens would probably result in additional expense for clients.

Feasible Alternatives with California Intact

The Committee desires to present five plans which it deems are feasible alternatives to the recommendations of the Commission:

Plan A

Ninth Circuit: California and Arizona	1777
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Nevada, Hawaii and Guam	539

Plan B

Ninth Circuit: California and Nevada	1613
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Hawaii and Guam	439
Tenth Circuit: Add Arizona	234

Plan C

Ninth Circuit: California, Hawaii and Guam	1616
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Nevada and Arizona	700

Plan D

Ninth Circuit: California	1543
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Nevada, Arizona, Hawaii and Guam	773

Plan E

Ninth Circuit: California, Hawaii, Nevada and Guam	1689
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Arizona	627

* Includes appeals from administrative agencies and original proceedings

These plans inevitably will be measured against the criteria of the Commission, five in number: "First, where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created. Second, no circuit should be created which would immediately require more than nine active judges. Third, the Courts of Appeals are national courts; to the extent practicable, the circuits should contain states with a diversity of population, legal business and socio-economic interests. Fourth is the principle of marginal interference: excessive interference with present patterns is undesirable; as a corollary, the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change. Fifth, no circuit should contain noncontiguous states."

Preliminarily, we observe that these criteria represent a priori assumptions. They may (or may not) be ideal in the abstract. But, we deal with difficult choices in an imperfect world. Some flexibility is needed, and the Committee submits that the alternatives to a division of California pretty well satisfy the principles behind the Commission's criteria and offer a reasonable balancing of the various interests involved.

The Committee would like to treat briefly the two main objections that have been raised to a circuit consisting of the State of California alone. First, the fear of influence by a single, senior senator, and second, inadequate diversity. The following observations, we believe, meet both points. The Commission's concern that more than two senators are needed to maintain the qualifications of a circuit bench are of questionable significance in the case of California, at least. California is the largest state in the nation. Its geography, economy and society reflect greatly diverse interests and influences. Its elected representatives must be responsive to this diversity of opinion and values, as must the President himself in considering appointments to seats in California. This same pattern of California politics applies to the Commission's fear that a single senator of long tenure could "mold the court for an entire generation". Furthermore, it must be pointed out that even though not applicable to the same degree in the federal system as in the state system, the present trend of the judicial selection process is to de-emphasize political considerations and to apply relatively objective standards related to judicial aptitudes.

Plans A and B above contemplate circuits of two states. While the Commission expresses a preference for circuits of at least three states, the Commission itself was obliged to propose a circuit of two states (plus the Canal Zone with only six filings) as its alternative Plan No. 2 for the division of the Fifth Circuit. This illustrates that the Commission's criteria are not self-executing and inflexible principles. What is involved is an accommodation of interests.

The second criterion of the Commission represents a laudable aim, but at the same time it opts for even more circuits in the future. The Committee agrees that circuits of nine or fewer judges seem to possess advantages like greater institutional unity and greater feasibility of en banc hearings. Yet, if federal appellate business does continue to grow, a decision will have to be made whether to divide a number of circuits (possibly making a fourth tier of courts desirable to relieve partially the Supreme Court) or to add judges above nine to several circuits and utilize divisions within circuits or other solutions. This dilemma should be faced directly. If the choice will be to avoid an increase in the number of circuits, then the present caseload moving to the Ninth Circuit from California is not nearly as persuasive in favor of splitting California.

Plan A, grouping Arizona and California, makes for the largest number of filings currently. Still, with 11 or 13 judges the average number of filings per judge would be 162 and 137 respectively. These would compare, not too unfavorably, with 145 filings per judge for the nine judge circuit envisaged by the Commission to cover Arizona, Nevada, and the southern and central districts of California.

The fourth principle of "marginal interference" permits the transfer of a state to another circuit if there is "countervailing benefit". The Commission's alternative Plan Number 1 for the division of the Fifth Circuit moves Arkansas from the present Eighth Circuit to a new western circuit. Similar considerations might be applied to the transfer to Arizona to the Tenth Circuit, contemplated in Plan B above. The caseload of the Tenth Circuit can absorb the filings of Arizona (234 in FY 1973). Detachment of Arizona from the new Ninth Circuit would cut away appreciable filings. Not adding Arizona to the new Twelfth Circuit would

decrease the distance problem. The principal objection to moving Arizona seems to be trade ties that Arizona has with Southern California. It is believed that there is significant commerce also between Phoenix and both Albuquerque and Denver. The Committee has not tried to determine the extent to which Arizona jurisprudence is derived from California or from the states that might comprise the new Twelfth Circuit. However, the Committee does note that Arizona historically was part of the territory of New Mexico.

In presenting this suggestion as one of the alternatives, the Committee recognizes that Arizona's assignment to the Tenth Circuit might or might not result in some interim uncertainty. If there are significant differences in law between the Ninth and Tenth Circuits, should any different rule in the Twelfth Circuit be applied retroactively to transactions in Arizona prior to the transfer or not? The Committee assumes that fair solutions to this and other questions exist, but has not itself had an opportunity to pursue them.

The fifth criterion is satisfied by all plans, except plan E. The first and third criteria seem to be based in part upon the same underlying consideration, namely the desirability of diversity. The Committee does not prefer a one-state circuit, but it believes that California alone would generate a diverse caseload. Probably, it is desirable to group three states or at least two states in a circuit. However, a one-state circuit of California may be indicated, if spokesmen for Hawaii or Nevada oppose being attached to California alone or together out of a genuine concern of being "dwarfed". We in California would welcome them but would want them to be willing participants. If they felt more comfortable with states generating caseloads more like their own, that should be considered.

The Commission felt that a new northwestern circuit excluding any portion of California would not have enough of a caseload to be viable. The Committee respectfully disagrees. The new circuit under Plans C and D above would have a caseload slightly less than that of the Eighth Circuit. The new circuit under Plans A, B and E above would have a caseload equal to or in excess of the First Circuit. Concededly, the size of the First Circuit is too small to be ideal. But, with three to five judges there is economy of judicial manpower. The population and caseload of the proposed new Twelfth Circuit can be expected to grow at a more rapid rate than that of the First Circuit. Also, lawyers from the Northwest, particularly those from Seattle, indicated before the Commission a strong preference for their own circuit, not attached to California or even to a part of California. Lastly, the Commission's report indicates that a separate circuit for the Northwest states may become appropriate, if population growth materializes.

CONCLUSION

The Committee as a result of its independent analysis is in accord with the position of the State Bar of California that every effort should be made to keep the Ninth Circuit intact. The Committee recommends a crash program with special panels to reduce the large backlog. We recommend opposition to the Commission's proposal and to pending legislation, which we have concluded are objectionable and do not tackle the basic problems. We endorse the request that has been pending for some time before the Congress for at least two more judges for the Ninth Circuit. Had these judges been added earlier, the backlog today would not be the serious problem that it is. With the backlog eliminated or greatly reduced and with the additional judges the caseload of the Ninth Circuit can be managed, by two divisions, if necessary, while structural and procedural forms are studied and implemented. If the Ninth Circuit is to be divided, the Committee strongly recommends that the State of California be kept intact under one of the five feasible alternatives presented in this report.

(Signed) Jerome I. Braun

(Signed) Frederick P. Furth

Continuation of signatures to Special Committee Report dated June 15, 1974 on Ninth Circuit Revision.

(Signed) John T. Hansen

(Signed) James F. Hewitt

(Signed) Charles A. Legge

(Signed) *Matthew P. Mitchell

(Signed) David C. Moon

(Signed) Bernard Petrie (Chairman)

(Signed) Cecil F. Poole

* Mr. Mitchell declines to endorse Judge Kilkenny's plan.

DISSENTING.

(Signed) Noble K. Gregory
(Dissent attached)

APPENDIX TO REPORT OF SPECIAL COMMITTEE

**List of Possible Reforms in Structure and
Procedure in the Federal Appellate System**

1. Creation of circuit public solicitors and defenders to represent the government and indigent defendants.
2. Requirement that circuit judges reside at headquarters.
3. Pre-screening of cases to segregate those probably not benefiting from oral argument or raising issues of general importance.
4. Restriction of district judges and possibly visiting and senior judges to certain categories of cases.
5. Requirement of summaries from counsel of issues and positions and consolidation of like-issue type cases.
6. A floating interest rate on money judgements tied to the prime rate.
7. Periodical published analyses of judicial output, both circuit and individual.
8. Use of two-judge panels with tie-breaker judge, if necessary.
9. Elimination of diversity jurisdiction or modification of it, for example, by raising minimum monetary level and ALI recommendation that instate plaintiff cannot bring a diversity suit.
10. Increased decision from bench without opinion and with or without oral explanation, especially for affirmance.
11. Abolish three-judge courts.
12. Retention of appeal in criminal cases with certiorari in some civil cases, for example, diversity cases or cases involving review of evidence to support jury verdict.
13. Increases of professional staff to screen and do other tasks.
14. Award of attorney's fees as well as costs against losing party.
15. Creation of non-judicial body to investigate prisoner complaints.
16. Consider functional division of circuit (separate criminal and civil).
17. Revert to pre-1968 Rule 23 for en banc hearings.
18. While giving due recognition to importance of oral argument, discretion to eliminate or limit oral argument, with possible request to counsel to state in advance the thrust of oral argument, and encouraging judges to focus counsel before or at argument on troublesome issues.

**Statement of the Committee on Federal Courts
of the Association of the Bar of the City of New York,
Opposing Revision of the Boundaries of the Second Circuit**

I am Alvin K. Hellerstein and with me are Irving Younger and Bernard W. Nussbaum. I am a member of Stroock & Stroock & Lavan and I am Chairman of the Committee of Federal Courts of the Association of the Bar of the City of New York. Judge Younger, who is on the bench of the Civil Court of the City of New York, and Mr. Nussbaum, who is a member of Wachtell, Lipton, Rosen & Katz, are members of that Committee. In addition, Judge Younger and Mr. Nussbaum are both former Assistant United States Attorneys for the Southern District of New York and each is presently a member of the adjunct faculty of the Columbia University School of Law.

The Committee on Federal Courts is a standing Committee of the Association of the Bar of the city of New York. The Committee has 19 members, appointed to staggered three-year terms by the President of the Association upon the recommendation of the Chairman. The membership of the Committee is intended to reflect different philosophies and specialties in order to bring together as wide and representative a set of perspectives as possible. What we all have in common is that each of us has practiced or is practicing law in the federal courts of our Circuit and we have gained a deep and abiding respect for those courts.

We appreciate the opportunity to appear before this Commission and give our views with respect to the proposed realignment of the geographical boundaries of the Second Circuit. While no one committee -- or one Bar Association for that matter -- can be said to represent an entire bar, we believe that the views we express are widely shared by the Second Circuit bar. In this connection, we hope that the members of this Commission will agree with us that before any recommendation is made to realign the present boundaries of the Second Circuit, it must first be determined whether there is a felt need among the members of the bar -- the lawyers who day in and day out practice before that Court -- for such a change. We respectfully submit there is no such felt need. Thus, we strongly oppose any recommendation to alter the present geographical boundaries of the Second Circuit.

It is not our purpose here to offer to this Commission massive statistics respecting judicial business in this Circuit and others -- although we must necessarily touch on some -- for we are aware that you and your able staff are in the process of collecting and analyzing such figures. What we are here to do is to offer the experience with the court of the bar practicing before it. And it is our experience that the Second Circuit yields to none in maintaining its tradition of judicial excellence. It is respected for its opinions and current in its business. No litigant in the Second Circuit, whether in a civil or a criminal case, need suffer delay in having his case heard or decided. Nor does he have to forego oral argument.

During the fiscal year ending June 30, 1973 -- in which period the Second Circuit decided more criminal cases than all but two of the other circuits -- it took only 3.8 median months from the filing of the complete record in a criminal case to final disposition. In this, the Second Circuit stood first among all the circuits. With respect to all cases, civil and criminal, the median time interval in the Second Circuit from filing of the complete record to final disposition of the appeal was 4.8 months. In this, the Second Circuit was surpassed only by the Eighth, and then only by 3/10 of a month and in the context of a considerably smaller caseload.

What do these statistics mean to lawyers and litigants in the Second Circuit? Using median time periods: in a criminal case, the argument follows the last brief by but six days; in a civil case, by but 27 days. The comparable median time periods for all federal Courts of Appeals are 39 days for criminal cases and 69 days for civil cases. A lawyer or litigant could ask for little more.

Our experience with the speedy and efficient manner in which the Second Circuit hears and disposes of its cases causes us to place less weight than do others on such statistics as the number of cases pending at the end of a fiscal year, or the total number of cases filed during any fiscal year, or the filings per judge. These figures often include cases which for one reason or another may never be carried to conclusion. Moreover, it is often misleading to speak of cases which are pending as a "backlog", as if somehow these cases are interfering with the disposition of other cases which are being docketed and briefed. A large circuit must have cases pending at the end of any fiscal year if the Court is to be occupied. Moreover, many cases, listed as pending for the Second Circuit in fiscal 1973, were filed late in the year, and for that reason could not be disposed in the short time remaining before the end of the year. As indicated, the important question is whether all cases which have been docketed and briefed -- regardless of whether or not they have been characterized as "pending" at the end of a fiscal year -- are being speedily and efficiently disposed of. In the Second Circuit, the answer is that they have.

This record is all the more impressive because it has been accomplished without limiting oral argument, a practice which we understand has been adopted in other circuits. Oral argument is the means by which lawyers can occasionally touch the hearts and minds of judges, and by which judges can probe attorneys about the issues that trouble them. To deprive lawyers of this contact with the Court, and to deprive the Court of this contact with attorneys, in our opinion, seriously interferes with the quality of justice. We note with pride that the Second Circuit has refused to abandon the tradition of oral advocacy.

The Second Circuit is current even though for approximately two years it has been one active judge short of its full complement of nine. In addition, the Second Circuit has kept current with its calendar without adopting extensive screening procedures or creating a separate staff of professional law assistants employed by the Court as a whole. Should there be a substantial increase in judicial business, there is thus much that can be done even within the confines of a nine-man bench. And, if it comes to be necessary at some future time, the Court could in our opinion be increased by one or two judges (which would still keep it significantly smaller in number than the present Fifth and Ninth Circuits) without severely affecting its collegial atmosphere. By these means, the Court should remain current in handling its calendars for the foreseeable future.

Thus, neither the volume of its work nor the quality of its performance presently justifies any revision of the boundaries of the Second Circuit. But even assuming that such revision were attempted, there are additional compelling arguments against it. As the Commission is aware, during the fiscal year ending June 30, 1973, over 75% of the Second Circuit's caseload -- and undoubtedly a higher percentage of the difficult and complex cases -- came from just two districts, the Southern District of New York and the Eastern District of New York. From the Southern District alone came 56%. It appears, in consequence, that there are only two ways to reorganize the Second Circuit so as to achieve a substantial diminution in its volume. One way would be to allocate the New York districts to different circuits; it has been said, with respect to the Southern and Eastern Districts, that "the computer found such a separation attractive." The other way would be to constitute the four districts of New York a single circuit. We believe that each of these proposals would generate intractable problems of doctrine, administration and policy, and therefore oppose both.

Were the New York districts to be divided between two circuits:

- (1) Which precedents would govern in the realigned districts, the decisions of the old circuit or of the new?
- (2) Suppose one circuit declared a New York statute unconstitutional. What would be the effect of the decision in the other circuit? The result, and we need hardly say that we find it unseemly, might be that the statute was invalid in the courts of one part of the state and valid in another.
- (3) Apart from decisional asymmetry, a practical consequence of this would be

forum-shopping. Long disapproved as between state and federal courts, surely it should not be encouraged as between the federal courts of the state.

(4) Questions of state law must of course be decided by federal courts in diversity cases. Were the New York districts split between two circuits, there would inevitably be conflicting decisions on identical questions of state law. The result would be a lessening of public and professional confidence in the coherence of the administration of justice in the federal courts.

(5) And since questions of state law are frequently presented in specifically "federal" actions -- e.g., bankruptcy matters, civil rights actions, federal tax cases, suits under the Federal Tort Claims Act -- there would be more instances of conflict between the circuits. Because these conflicts would arise in "federal" actions, it is natural that litigants would look for their resolution to the Supreme Court, thus adding to that Court's already heavy burden of petitions for certiorari.

Were the four districts of New York to be constituted a single circuit, eliminating Vermont and Connecticut:

(1) When all the judges of a circuit come from one state, they may lack something of the collective breadth, roundedness, and acuity engendered by a mixture of outlooks and experiences.

(2) The risk of political parochialism would be substantially increased. One party may retain the Presidency and both Senators from a given state for a long time. With three states as diverse as New York, Connecticut and Vermont, that risk is less likely.

(3) The impalpable but nonetheless important quality of prestige would be affected for the worse were the Court of Appeals to lose its broad geographic base. We do not believe that the Second Circuit should be simply a New York court.

The Second Circuit for over 170 years has had a great and distinguished history. Today it continues to act in the highest traditions of judicial craftsmanship. In so doing it has not fallen behind in its business; it acts speedily and efficiently with respect to the cases that come before it; lawyers and litigants are assured of a prompt hearing and disposition of their appeals and the Court enjoys wide respect and esteem. We are strongly of the opinion that not only does the bar of the Circuit feel no need for a reduction of the geographical boundaries of the Second Circuit, but, for the reasons we have given, is unalterably opposed to any such proposal. Speaking on behalf of many members of that bar, we respectfully request this Commission to let the Second Circuit be.

DISSENT

The majority report provides no answer to the carefully considered and unanimous recommendation of the Commission on Revision of the Federal Court Appellate System, that the Court of Appeals for the Ninth Circuit presently be divided.

The basis shortcoming of the majority report is that it ignores the present realities which contribute the basis for the recommendation that the Ninth Circuit be divided, while concentrating its attention on highly speculative and largely irrelevant possibilities. The central reality, which cannot be ignored, is that the present work load for the Ninth Circuit is too large for a court already consisting of thirteen judges. As the Commission has pointed out, there were 178 filings per judgeship in the Circuit in fiscal year 1973. This was second highest in the nation, and represents over a three-fold increase since 1961. The majority does not contend that this caseload will suddenly disappear. To the contrary, even under their speculative assumptions, they predict that the caseload will increase "for the foreseeable future" and they join in requesting immediate provision of "at least two more" judges for the Circuit. Thus, the majority acknowledge that the present and minimum foreseeable caseload for the Circuit will require, at the very least, a court of 15 active circuit judges. And even more will be required if the circuit's caseload continues to increase at anything like the rate that has been regularly experienced since 1961.

There is no need to repeat here all of the reasons underlying the Commission's conclusion that a court of 15 active circuit judges is entirely too large to permit the fair and efficient administration of justice. As the Commission summarized its position with particular reference to the Fifth Circuit, which is presently composed of 15 judges:

"The Fifth Circuit has grown to a court of 15 active judges, each of whom shoulders a heavy workload despite the use of extraordinary measures to cope with the flood of cases. Serious problems of administration and of internal operation inevitably result with so large a court, particularly when the judges are as widely dispersed geographically as they are in the Fifth Circuit. For example, it becomes more difficult to sit en banc despite the importance of maintaining the law of the circuit. Judges themselves have been among the first to recognize that there is a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. In 1971 the Judicial Conference of the United States endorsed the conclusion of its Committee on Court Administration that a court of more than 15 would be 'unworkable'. At the same time, the Conference took note of and quoted from a resolution of the judges of the Fifth Circuit that to increase the number of judges on that court 'would diminish the quality of justice' and the effectiveness of the court as an institution."

In view of the general consensus that a court of 15 judges is undesirable and indeed, unworkable, and in view of the majority's position that a court of at least 15 judges is already required in the Ninth Circuit, it is difficult to understand the majority's conclusion that any present division of the Ninth Circuit would be "premature."

There was, moreover, substantial evidence before the Commission that the problems of administration and institutional unity inherent in a court of 15 judges have already manifested themselves in the Ninth Circuit. The Commission summarized the evidence before it as follows:

"Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently

inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved. Whatever the reason, for two successive fiscal years, 1971 and 1972, there were no en banc adjudications. More recently, the court has accepted a number of cases for en banc determinations and appears to be doing so with increasing frequency. It remains to be seen whether this will serve further to exacerbate the problems of delay."

The majority rely in part on the possibility of adopting procedural reforms in lieu of a division of the circuit. However, these reforms could obviate the current need for 15 or more active circuit judges only if they could be expected to produce a large increase in the already crushing workload of 165 annual dispositions per judgeship. This result is unlikely. As Circuit Judge Duniway pointed out in his persuasive testimony before the Commission, the court has already adopted numerous procedural devices in an effort to increase its efficiency, resulting in a pre-judge increase in dispositions from 52 per judgeship in fiscal 1961 to 165 per judgeship in fiscal 1973, including approximately 110 opinions per judgeship per year. It is unrealistic and highly speculative to assume that procedural reforms alone can result in a significant increase in judicial output beyond that already existing. This conclusion is reinforced by the fact that the two procedural reforms which offer the clearest potential for increasing per judge output, screening and limitation or elimination of oral argument, are already heavily employed in the Ninth Circuit under Circuit Rule 3(a). (See Judge Hufstедler's address of June 27, 1974, to the Los Angeles County Bar Association, reprinted in the Los Angeles Metropolitan News, June 28, 1974.)

The majority also opposes the presently needed division of the circuit on the ground that it may "divert efforts" from the need for a general "overhaul" of the federal appellate system, and suggests that the choice must now be made between splitting circuits on the one hand, and procedural and other reforms on the other. There is, however, no warrant for such an "either-or" approach, as the Commission specifically pointed out:

"The Commission harbors no illusions that realignment is a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals. These problems are unlikely to be solved by realignment alone without destroying or impairing some of the most valuable qualities of the federal court appellate system. It is our opinion, however, that realignment is a necessary first step in the Fifth and Ninth Circuits, not only to afford relief to the pressing problems of the present, but also to provide a firm base on which to build more enduring reforms."

A large portion of the majority's report is devoted to the exposition of certain statistics which purport to show that if the Ninth Circuit is divided along the lines indicated, the current diminishing workload in selective service cases may be unduly concentrated in the new Ninth Circuit, whereas the current increasing workload in narcotics cases may be unduly concentrated in the new Twelfth Circuit. Thus, concludes the report, further study is needed in order to assure that the caseload in each new circuit will grow at the same rate. Even if these statistics be accepted at face value, they are essentially irrelevant. The fact that one circuit's caseload may grow slightly faster than that of another in the future does nothing to obviate the present need for division created by the existing caseload. Further, the majority have made no effort to quantify the purported difference in growth rates arising from the alleged imbalance in relation to the overall caseload of the proposed new circuits. Nor do they suggest that the historical overall rate of growth of appellate caseloads in the proposed circuits is significantly different. Indeed, to the extent there is any "imbalance" created by the distribution of narcotics and selective service cases, it seems probable that it is cancelled out by "imbalances" in other types of cases not identified by the majority.* Moreover, the majority report makes no effort to take

* Thus, the majority themselves suggest that potentially more difficult private antitrust appeals may be more heavily concentrated in the proposed Ninth Circuit. This would tend to offset any possible "imbalance" created by the allegedly uneven distribution of narcotics and selective service cases.

account of the extent to which the workload significance of criminal narcotics and selective service cases has already been reduced by screening under Circuit Rule 3(a).

The majority offer several proposed alternatives designed to avoid the necessity for dividing the judicial districts of California among two circuits. However, as the Commission has pointed out:

“a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that now obtains in the Ninth Circuit. In addition, it would do little to solve the existing problems of the Ninth Circuit because California now provides two-thirds of the caseload of the circuit as presently constituted.”

This conclusion is strikingly demonstrated by the extreme imbalances in the caseloads of the proposed circuits under each of the five alternatives advanced by the Committee. Plan “D” in which California alone would constitute the new Ninth Circuit, involves the least imbalance. But even under that plan nine judgeships would be required to maintain the current unacceptably high per judge caseload in the “California” circuit, which only five judges would be sufficient to handle the caseload in the other new circuit. Thus, even the least distorted division proposed by the majority would simultaneously create a one-state circuit and yet another unduly small circuit without achieving the substantial benefits that may be realized under the Commission’s proposal.

The majority’s fears respecting potential conflict in matters of interpretation and validity of California state laws are likewise speculative and are fully dealt with in the report of the Commission. As Circuit Judge Duniway pointed out in his testimony before the Commission, the jurisprudence of California is highly developed thus minimizing the potential for conflict in matters of interpretation. Further, there is no substantial reason to doubt that such devices as abstention and certification, if proved necessary, will be appropriately authorized (in the case of certification) and utilized by federal judges sensitive to the need to avoid such conflict. Even without utilization of such devices, decisions of the state courts on matters of state law control those of the federal courts, and any conflicts on significant points of state law that may develop are unlikely to endure. As to possible conflicts regarding the validity of state law under the Federal Constitution and Statutes, the express conflict resolution provision of the proposed implementing legislation provides an adequate remedy should any significant conflicts develop.*

A more important “conflicts” problem than that hypothesized by the majority for the future is reflected in the substantial evidence received by the Commission that “attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved.” This very real and existing problem is an outgrowth of the problems of “institutional unity,” discussed by the Commission, resulting from the court’s large size and caseload.

The Commission likewise fully dealt with the majority’s preference for “divisions” within the circuit. As the Commission correctly concluded:

“Any scheme for restructuring the Ninth Circuit into divisions depends for its success on a mechanism for preserving a unified law within the circuit. The proposals we have received recognize this but defer the consideration of specific details on this crucial matter. Thus, it is difficult to predict how the divisions would operate. In all likelihood, however, the two divisions would soon act

* As the majority recognize such conflicts are possible even today among the decision of the four Federal district courts located within California.

and be perceived as separate courts. As a result the circuit would be divided in fact though not in law. Enormous administrative difficulties might be created by the need to coordinate the activities of the two divisional headquarters and the directives of the two divisional chief judges. The present problems of avoiding intra-circuit conflicts would be exacerbated, inasmuch as only a proceeding that included judges from both divisions could speak with authoritative finality."

Noble K. Gregory

Mr. PETRIE. Our report is dated July 15, 1974, and has been approved by the board of directors of the Bar Association of San Francisco on July 24, 1974.

A majority of nine, including myself, opposed the Revision Commission's report, and the pending proposal to realign the ninth circuit, principally because it would entail a division of California, Mr. Chairman. One member, Mr. Gregory, dissented and his dissent is a part of that report. We hesitated before challenging the proposal of the distinguished Commission and its able and courteous director, Professor Levin, but, with respect, we cannot agree that the pending bill strikes the best balance.

Probably you have heard almost as many views on realignment as have been expressed recently on inflation. Mindful of that and of your time, I will not repeat in any detail what is contained in our report.

Mr. Chairman, I understand that you and Mr. Levin are familiar generally with that report. You are aware that the Bar Association of San Francisco urged that the ninth circuit be kept intact, at least for the time being, that more judges be added, that the Administrative Office of the U.S. Courts be asked to analyze the kind of caseload coming from the various districts to the ninth circuit and then, on any eventual realignment, the State of California be kept intact.

We were and are concerned about the potential for conflicting or confusing judgments or interpretations of California law if California were divided between two circuits. We were concerned also that a split of California would tend to polarize the northern and southern parts of the State. Parenthetically, may I say that nothing seems to have united southern and northern California more in recent times than the Commission's recommendation and this pending legislation. The two parts of the State of California are quite different in many ways, yet the Federal Courts Committee of the Los Angeles County Bar Association was also almost unanimously against any division of California, as we, of course, were.

In a moment I would appreciate the opportunity to deal with some of the numbers as to filings and numbers of judges and consider with you what we deem to be feasible alternatives to severing California.

But first, we of the San Francisco Bar Association would like to pose what seemed to us to be some of the basic questions and then go on to suggest some tentative answers.

The first question we would like to raise, Mr. Chairman, is: Does the proposed realignment best promote a desired regionalism? Our second question would be: Does the proposed realignment furnish a basis upon which to build in the next 25 years or even the next 10 or 15 years?

The third question: Is it worthwhile to sever California in order not to exceed the number of nine judges?

Now, Mr. Chairman, I would like to speak first as to the first question. All of us want to pay more than lipservice to regionalism. The question that troubles me is how can regionalism be served by cutting

California and by putting one-half of it in the twelfth circuit and the other half in a new ninth circuit. While the analogy is not exact, Senator Cranston does not represent one-half of California, and Senator Tunney does not represent the other; they both represent all of California.

The Federal circuit courts have a different role of course, but isn't there some parallel? We have asked ourselves what is meant by regionalism or federalism, particularly with respect to the Federal circuit courts. I suppose that regionalism connotes drawing upon the diverse elements from several States, not only to avoid provincialism, but also to gain insight and strength. To what end? We submit so that the Federal circuit court can serve as a beacon and a unifying factor, so that all the Federal courts can strengthen all the States of the Union. Doubtlessly, Mr. Chairman, others can articulate better the moving spirit behind regionalism and its aim. It seems to us there are two concepts, drawing strength from the various States and then unifying and strengthening them all together.

What we hope to do is to focus this subcommittee on what seems to us should be of paramount concern, and we of the San Francisco Bar Association cannot see that regionalism is best served by severing California. The Federal Government would be a divisive, not a unifying factor, and all in the name of judicial efficiency.

Now, to turn, Mr. Chairman, to our proposed answer to the second question. The question differently stated is will the proposed realignment, in the words of the Commission's report, "provide a firm base on which to build more enduring reforms?" We believe we can all agree that the solution should be a long range solution. Yet, regretfully, we cannot see that the proposed grouping of the twelfth circuit would last even for 5, let alone 25 years, if the Commission's criteria leading to the spit of California are to continue to apply; that is, the desirability of nine judges and so many filings per judge. Already the figures for fiscal year 1974 render the twelfth circuit too large to meet the criteria for the optimum of judges and filings. Based upon figures secured from Mr. Luck, our circuit executive, I calculated a figure of 1,552 filings, and 172 filings per judge, for a nine-judge court for the proposed twelfth circuit. Now, this is an immaterial difference of 1 from the figure of 171 filings per judge which I understand Judge Duniway presented a couple of days ago.

But the important thing to us is that the filings have increased in the proposed twelfth circuit from 1,302 in fiscal year 1973—I refer to the Commission's report at page 13—to 1,538—that is Judge Duniway's figure—to 1,552—that is my calculation. I believe, Mr. Westphal, you earlier this morning referred to a figure of 1,545. But the difference in those seems to me to be immaterial.

This is an increase of somewhere between 236 and 250 filings during the 1 year and boosts the present judge filings from 145 filings per judge—I refer again to the report of the commission at page 14—to 171 or 172 filings per judge.

Now, this increase, it seems to us, illustrates that the use of statistics to construct a position at any given point in time will rest on shifting sands, and this is illustrated, we believe, by how Judge Duniway has had to shift his position and his emphasis just a little bit from the time that he filed a statement with the Commission to the time that he filed his statement with this subcommittee just 2 days ago.

Now, we of the San Francisco Bar, Mr. Chairman, and lawyers throughout the ninth circuit have the highest respect for Judge Duniway, and I am referring to this merely to indicate that to us even these figures that are taken at any point in time must be viewed as relative figures. Now, in the statement that Judge Duniway filed with the Commission—I refer to page 14 of that statement, Mr. Chairman—Judge Duniway was arguing against the proposition of California alone becoming a separate circuit with nine judges, and he said, “As will at once be apparent, the single most important figure is 1,550 cases from California. If California alone became a separate circuit with nine judges, there would be 172 filings per judgeship, a figure far too large, in my opinion.”

Yet, when Judge Duniway is confronted with the figure of 171 filings or 172 filings per judge for the proposed new twelfth circuit, according to the fiscal year 1974 figures, he is obliged to change emphasis somewhat, and I now refer to page 15 of the statement that he filed with the subcommittee just a couple of days ago: “Nine judges in the new ninth would face 129 filings per judge. Nine judges in the new twelfth would face 171 filings per judge. The 129 is a reasonable number, in my opinion. The 171 is high, but much better than the 207 we faced in fiscal 1974 or than the 192 that a circuit of California alone would face. In the proposed new twelfth, the judges would be in a reasonably compact circuit geographically and could function much better as a unit than we now can.”

Mr. WESTPHAL. Mr. Petrie, if I may interrupt at this point.

Mr. PETRIE. Yes.

Mr. WESTPHAL. You were not here on Tuesday when Judge Duniway testified, and I think you should know that in subsequent testimony, with reference to that particular language on page 15 which you have read, he conceded yesterday that 171 per judge was higher than he would like to see and that that figure could be reduced by adding a 10th or 11th judge, for example, to get it closer to the figure of 129 which he feels is a very manageable figure. I think the comparison you make is a valid one, but Judge Duniway's subsequent oral explanation should be taken into consideration.

Mr. PETRIE. I very much appreciate, Mr. Westphal, your pointing that out and bringing me up-to-date. So that, if I understood what you say, Judge Duniway, in his oral testimony, was willing to accept a 10- or 11-judge court?

Mr. WESTPHAL. He said he thought that it could start out with nine judges and we could see if it increases in efficiency. The nonscatteration of judges could help them to keep up with a caseload as high as 171. He thought that that new circuit should have an opportunity, if created, to try that before they would come to the Congress and ask for a 10th or 11th judge.

Mr. PETRIE. We feel this increase, just in the one fiscal year, is an indication that the caseload in the proposed twelfth circuit probably would continue to grow, especially from southern California and Arizona, so that nine judges very soon will not be enough to handle that caseload. Let us grant that nine is the optimal number, furnishing enough diversity and yet still being cohesive enough. Still, we note that many notable courts have more than nine judges; the World Court, the Tax Court, the English Court of Appeal, the English criminal Court of Appeal. With that consideration, we have suggested that

more judges be added right away to the present ninth circuit, and that Judge Merrill's vacancy be promptly filled. We have suggested, as I believe you are aware, in our report, that it would be useful to secure from the Administrative Office of the U.S. Courts an analysis of the kinds of cases that are going up to the ninth circuit from the various districts, information that we don't yet have but which we are told is readily available in the computer bank. This might assist your subcommittee in determining the best grouping or a realignment of the circuit. It might not add much, but the information seems to be readily at hand. Meanwhile, you would have an opportunity to see how well a court with 15 or 18 more circuit judges might work.

Now, the third question that we posed: Would it be worth severing California to start out with courts of nine judges or less? We believe the answer to that is found in this brief discussion and the answers that we have suggested to the two prior questions. We believe that there is a potential conflict if you set two circuits over the two halves of California; that there will be contradictory judgments and orders; that there will be conflicting interpretations of State law; and that there will also be conflicting interpretations of Federal law. I understand that other witnesses who have preceded me have tried to address themselves both to the possibility of conflicting interpretations of Federal law, as it pervades many areas now and many areas to come, and State law.

We, at the San Francisco Bar Association, considered as carefully as we could the staff report assembled under Professor Levin's able direction, and the idea that many devices that presently exist and other devices that could be constructed might obviate these conflicts. But we are dubious that they would work well enough. What these devices seem to involve is preventing litigants from proceeding, or moving them from Los Angeles or San Francisco to Sacramento, to obviate these conflicts, and the utilization of the devices would in themselves involve judicial time and judicial manpower. So we have our misgivings about the avoidance of conflicts.

Now, Mr. Chairman, I would like to talk briefly about various alternatives that seem to us to be feasible alternatives to the pending legislation. In our report, and I believe you and Mr. Westphal are generally familiar with the report of our Special Committee that has been adopted by the Board of Directors, we set forth five different plans, including the plan of California as a single State circuit. We contend that California would be diverse enough by itself.

These prepared remarks, Mr. Chairman, are not going to last much longer, and then I would welcome any questions that you and Mr. Westphal might have. They are not really prepared remarks, Mr. Chairman. As these hearings have proceeded, we have been trying to revise our remarks so that we might be able to make some fresh contribution to these hearings, although one always despairs of being able to really do that with the learned witnesses that precede one.

As I say, one of our plans is for California as a single State circuit, but we recognize that two States are better than one and three States are better than two. It is a matter of balancing the factor. Our thought was that if it was extremely important to keep down the number of filings per judge and the number of judges on the court, then very serious consideration should be given to California as a one-State circuit. If you're content to give a little leeway, we would then like to

talk about first, perhaps adding Hawaii and Guam to California as a circuit. Immediately you double the number of Senators, although as our report indicates, we believe that the two California Senators alone would have to be responsive to the diverse interests of the State, and we would hope that out of that would come a diverse judiciary, even for a one-State circuit. But we grant that four Senators would be better than two in that regard, perhaps, and that Hawaii and Guam would add some diversity—though that State and Guam would, of course, add the fewest filings to the new circuit. Nevada would add somewhat more filings. I have figures here. Perhaps you also, Mr. Westphal, have added them up. I come out, for a circuit with California, Hawaii, and Guam, based on the figures for fiscal year 1974, with 1,832 filings, and, with an 11-judge circuit, that is 167 filings per judge. It seems to us to be in the ball park. If you add Nevada, instead of Hawaii and Guam, and join Hawaii and Guam to a north-western circuit, you would add a few more filings. A figure of 1,832 would give you about 300 more filings, a little less, than the filings for the new twelfth circuit based on the fiscal year 1974 figures. Arizona in place of Nevada, of course, would mean more filings.

Now, if this number of filings is too much for a circuit, Mr. Chairman, then we at the San Francisco Bar Association would be bound to ask this subcommittee if you would be turning next to the second circuit, because that is roughly its number of filings. I was struck with what you said this morning, Mr. Westphal, about the second circuit having more senior judges and other assistance, but I still think the situations are roughly comparable. So, if that number of filings that we propose for a new circuit is too much, then the next step would seem to be to form a circuit out of the Southern District of New York and Vermont or Connecticut, with added burdens for the Supreme Court.

So the question that we see arising here concerns the future. Is the future solution going to be to fragment circuits or to add judges to present circuits? As the Commission is now studying the possibility of structural revision and procedural reform, we hope that it will look at the appendix of suggestions that we have attached to our report—some 18 suggestions in number—which are worthy of consideration, we feel, and, if adopted, could enable a larger court to work well. For example, we suggest circuit solicitors on both sides, circuit appellate lawyers for the Government and public defenders at the appellate level. We wonder, Mr. Chairman, if it might not be a good idea for the circuit court to be able to award attorney's fees to winning parties on appeal. We have the feeling that in many instances today losing parties appeal, especially money judgments, so that they need not pay out on the judgments for a while.

Now, there are some things that we would like to call to your attention very briefly about these fiscal year 1974 figures. I have secured some of these from our circuit executive. The ninth circuit, Mr. Chairman, seems to be holding as many, if not more hearings than are being held around all the circuits. We offer this to indicate that we don't think that circuit has to be realigned tomorrow. I certainly want to argue my cases orally, and I believe most lawyers do, but according to these figures that Mr. Luke has given me, the ninth circuit in fiscal 1974 held 16.8 percent of all hearings. Now, that is to be compared to, I think, its percentage of the cases in the country that are terminated

after hearings or after submission, and that is only 14 percent. So the ninth circuit seems to be doing a little better than the national average on that.

There is one other recent statistic I would like to call to your attention. It is a calendar year statistic. In the first 8 months of this calendar year, the ninth circuit has made a net gain on its backlog of pending cases of 245. The filings for the first 8 calendar months of this year were just a little less, I believe 23 less, than the first 8 months of calendar year 1973. That is a little updating of the 5-month calendar figures that we had in our report.

Mr. WESTPHAL. Mr. Petrie, on that statistic, if you're considering the first 8 months of the calendar year, you have in operation two phenomena. That 8 months includes June, July, and August, and a lot of attorneys in the ninth circuit have some kind of vacation. Perhaps they don't file as many cases in July and August as in other months. There is also the fact that in May, June, and July the court has reached the end of the period of time when it normally hears oral arguments, and the judges, then, are turning out opinions that accumulate in various sessions. So you have a larger number of terminations during that particular period of time.

Mr. PETRIE. Well, I appreciate that, but we are comparing the first 8 calendar months of 1974 with the first 8 calendar months of 1973 when the same factors should seem to be at work.

Now, I can't draw any great hope from this that there is a real leveling off and that a plateau has been reached, but I think it may give a little less sense of urgency to your considerations, and we thought it was a significant statistic. I expect that the caseload is going to continue to increase more gradually as a federal consumer protection agency bill, and other legislation, is passed.

We would like to call your attention, if you haven't already noted it, to a study of the National Center for State Courts on the California Courts of Appeal. Perhaps you have already noted it. It seems to us that it contains some suggestions that are worthy of consideration here and before the Hruska Commission.

So the Bar Association of San Francisco, Mr. Chairman, respectfully urges this subcommittee not to sever California, diluting regionalism and raising problems. We believe that neat, nine, judge compartments are perhaps like the will-of-the-wisp. Sections of the country embracing large caseloads call for somewhat larger courts. All courts, but especially the larger ones, can be aided greatly by structural innovation, the subject of the Commission's second study.

We, the San Francisco Bar Association, Mr. Chairman, thank you for listening to these remarks, and I would be very pleased to try to answer any questions that you, Mr. Chairman, or Mr. Westphal might have.

Senator BURDICK. Thank you very much for your contribution. It has been very helpful.

In your presentation you talk about regionalism. How do you square regionalism with your recommended plan of keeping California alone in the circuit?

Mr. PETRIE. To us it is not the happiest solution, Mr. Chairman.

Senator BURDICK. How can you possibly—

Mr. PETRIE. We feel it doesn't dilute regionalism too much for this reason: the diversity of California. I mean, that is what we must come back to. One of the goals of regionalism that we apprehend is to draw diverse elements from various States of the Union.

Senator BURDICK. Texas could make the same argument. They are regional. They have everything from cattle to oil.

Mr. PETRIE. In California, Mr. Chairman, we would respond by claiming to be more regional and more diverse than Texas. That is all I can say. We have the cities of Los Angeles and San Francisco, as well as the farming country and the oil. It is a matter of degree, Mr. Chairman, I grant you, but that is the response that we would make. We do not prefer California as a one State circuit, but we say that that is a feasible alternative and a better alternative than splitting California.

Senator BURDICK. You have in your report a list of possible reforms of structure and procedure in the Federal appellate system. I would especially like to refer to item nine: Eliminate diversity of jurisdiction or modify it, for example, by raising the monetary level.

Well, I happen to be the author of a bill that will do just that. In fact, I have been an author of such a bill for the past 3 years, and you know, counsel, I haven't received encouragement from a single State bar association, including California's.

Mr. PETRIE. We will try to rectify that, Mr. Chairman.

Senator BURDICK. Well, you see, this is a long way off.

Mr. PETRIE. Well, it may or may not be, Mr. Chairman. But we hope that you're closer than you think to that.

Senator BURDICK. You haven't read my mail. The bar starts writing letters and that has quite an effect upon this Congress. You've come here with a recommendation from the bar association; do you have a recommendation on diversity?

Mr. PETRIE. Not a specific one, Mr. Chairman, because our special committee was formed mainly to study the report of the Commission, and that is all the authority that we have. But when I get back to San Francisco I will relay your remarks, and I will talk to the president of the bar association.

Senator BURDICK. Is Frederick Furth a member of your bar association?

Mr. PETRIE. He is a member of our bar association and a member of our special committee.

Senator BURDICK. He testified violently before this committee.

Mr. PETRIE. Well, he signed the report, Mr. Chairman.

Senator BURDICK. Well, you say they aren't following the recommendations, though.

No PETRIE. No, the appendix, this is a list of suggested structural reforms or innovations.

Senator BURDICK. You mentioned the conflicts that might arise in the State of California if we had two circuits. Judge Duniway testified here that in his 13 years on the bench, he has run across no problems like that at all, although you have four district courts in the State of California.

Mr. PETRIE. As I read his prepared remarks, he was talking about two things. One, he was talking about the three judge court situation, which involves the invalidity of a statute, and two, he was talking about conflicting interpretations of California law.

Now, as to the first point, Mr. Chairman, the invalidity situation, that does not seem to us to be the main problem. The main problem, or the potential for the most conflict, seems to us to inhere in the area of interpreting Federal laws as they apply to State or Federal constitutional requirements, as they apply to practices such as prison practices, questions in the environmental impact area, for example, or in the area of consumer protection, or in the welfare area or other areas that Judge Duniway was *not* talking about.

Senator BURDICK. You can imagine a lot of things. I can imagine all sorts of things, but are these more imaginary than real?

Mr. PETRIE. We have already had concrete examples, Mr. Chairman, of differing interpretations. For example, in the environmental impact area we have conflicts as to what constitutes an adequate environmental impact statement. There have been differing interpretations.

Senator BURDICK. This is rather a new law and when we finally get it shaped down by decisions, you will have to go to the Supreme Court on intercircuit disputes, that is true. But these things get settled.

Mr. PETRIE. They get settled, Mr. Chairman, but new laws seem to come along and new cases seem to raise new issues, so it seems to be a real problem to us.

Senator BURDICK. We are trying to help you. We are trying to get no-fault insurance. How do you stand on that?

Mr. PETRIE. I am all in favor of it, Mr. Chairman, because I don't handle personal injury matters.

I am also, Mr. Chairman, if I may add, personally in favor of reducing diversity jurisdiction, if not eliminating it. Yet I recognize that diversity jurisdiction constitutes only about 10 percent of the Federal caseload, more or less.

Senator BURDICK. Well, 10 percent is helpful.

Mr. PETRIE. It would be helpful.

Mr. WESTPHAL. It represents 3 percent of the cases tried by a jury.

Mr. PETRIE. That is interesting.

Senator BURDICK. So it is more than 10 percent in a way.

I have some floor business and I may have to leave before your interrogation ends. I hope not, but if I do, you will understand?

Mr. PETRIE. I will, Mr. Chairman.

Senator BURDICK. In which case we will adjourn until 2 o'clock this afternoon, when we will hear the remaining witness.

You may proceed.

Mr. WESTPHAL. Mr. Petrie, let me say this at the outset and reaffirm what I said in my letter. I want to compliment your committee and the San Francisco Bar in presenting to both the Hruska Commission and to this subcommittee an excellent statement. Not that we don't like what the Hruska Commission has recommended, but you did offer some analysis to the problem and some alternatives that could be placed alongside what the Hruska Commission has recommended.

Now, there are just a few points that I would like to explore. In your committee, and in your bar association's consideration of this problem, was their any discussion about this extensive use of district court judges as a third member of an appellate panel?

Mr. PETRIE. Mr. Westphal, not extensive discussion, but there was some discussion.

Mr. WESTPHAL. What generally is the attitude of the bar that you represent? Do they like that practice or don't they? Do they think it is one which should continue or don't they?

Mr. PETRIE. We do not like it, Mr. Westphal.

Mr. WESTPHAL. There has been some indication that, while the ninth circuit is reasonably current on criminal cases, they are 1½ to 2 years behind on civil appeals. What is the attitude of your bar group on that facet of this problem?

Mr. PETRIE. Well, we feel that that is a very unfortunate situation. Any delay in the trial courts, or in the appellate courts, of that magnitude sits very hard with the litigants. Cases should be tried and disposed of and should be appealed and disposed of faster than that. But I do concur with what Judge Kilkenney said earlier, if the vacancies had been filled faster and if the requests for additional judgeships had been met in the ninth circuit, the situation in the view of the bar would not be nearly as bad as it is now.

Mr. WESTPHAL. As you look back at the history of the country this matter of the speed with which vacancies are filled, is very much like the problems we've faced regarding declarations of war. I don't know how that time problem can be solved within the limits of the Constitution. I don't know how you can fill vacancies any faster when the process specified in the Constitution seems to entail as much time as it does.

Mr. PETRIE. We appreciate that it takes significant time and should take significant time.

Senator BURDICK. As the process of selecting a new judge goes on, your senior judge is there; in most cases, he is still operating.

Mr. PETRIE. Yes, but if the new judge were there, there would be two judges, Mr. Chairman.

Senator BURDICK. That is right, but the fact that you are waiting for an appointment doesn't mean you don't have a single judge in the meantime.

Mr. WESTPHAL. Then there will be an interval between the creation of the judgeship and the time it is filled by appointment. Again, this is in the same category as declarations of war.

Mr. PETRIE. Pardon me. You know, we in San Francisco believe that there must be senior judges or inactive judges around the country who can be brought into the ninth circuit, at least more of them than have been, on a kind of crash program to whittle away at the backlog.

Mr. WESTPHAL. The subcommittee has studied every one of the circuits in the country. We find that every circuit, in order to meet its increasing caseload is making virtually a full use of its own judges, both circuit and district. This flexibility that is extended into the system, by virtue of the assignment powers of the chief judges and the Chief Justice, is being utilized, and there is very little unused and untapped judge power going to waste. At least that is what we have found in our studies as we have reviewed not only the circuits but the districts.

Mr. PETRIE. You, of course, have a much broader perspective than we have.

Mr. WESTPHAL. We have had testimony concerning the experiences of a 15-man court which has also employed, at various times, visiting judges and assigned judges, giving it the equivalent of 19, 20, or 21 judges, in order to handle a caseload even larger than that of the ninth circuit. They devised a system which has in effect resulted in the elimination of oral argument in about 50 percent of their cases. Is that a

trend that you and your committee or bar group would like to see continue and spread from the fifth circuit into other circuits?

Mr. PETRIE. No, we don't welcome that in the sense that we believe in oral argument, but I do appreciate Judge Kilkenny's point that there are many cases that go to the circuit courts of appeal that can be decided wisely and correctly without oral argument.

Mr. WESTPHAL. Well, as a trial lawyer, I worked in the appellate courts for 20 years and I agree with you, but those are always the other lawyers' cases.

Mr. PETRIE. I certainly also want to orally argue my own cases, Mr. Westphal.

Mr. WESTPHAL. Mr. Petrie, I am curious as to what your reaction is as to the Kilkenny proposal as presented to the subcommittee this morning.

Mr. PETRIE. Well, we would like you to give it a chance to see how it works, and we think that that chance would be lost if you realigned the circuits. We saw enough promise in it that we were able to endorse it in our report. We did lose one of the nine-man majority. Mr. Mitchell felt that he could not endorse Judge Kilkenny's proposal. I have not discussed it with him at any length. We think, all in all, that it is a feasible proposal and that it offers a way to make larger circuits with more judges work.

Mr. WESTPHAL. What do you perceive to be the essential difference between the Kilkenny proposal and the Hruska Commission proposal?

Mr. PETRIE. Intracircuit conflicts rather than intercircuit conflicts, trying to resolve those conflicts at the circuit court level instead of further burdening the Supreme Court.

Mr. WESTPHAL. In other words, you are most concerned about the Hruska proposal focusing upon this problem of how you resolve conflicts of opinion between the new ninth circuit and the new twelfth circuit. You perceive that the Kilkenny proposal for division keeps substantially the same geographical realignment, but also keeps your conflict-resolving power out on the west coast instead of a block and a half down the street here in Washington. Isn't that what the problem is?

Mr. PETRIE. That is basically what I commented on. I wanted to refrain from repeating what I commented on earlier, but our principal objection to the recommendation of the commission is that it would entail a division of California—that it is divisive. Maybe this is imponderable, but we are concerned about it. We think that it would lead to a north-south polarization in California. There is that problem in addition to the mechanics of the thing.

Mr. WESTPHAL. Doesn't the Kilkenny proposal divide California by putting the northern and eastern districts in the northern division and the southern and central districts in the southern division?

Mr. PETRIE. Yes, but we don't think that is going to be nearly as divisive, because there will still be one circuit covering the State and other States.

Mr. WESTPHAL. Well, that gets down to the conflict resolving mechanism. In other words, divisiveness, splitting, polarization, whatever we want to call it, is a problem because of what one finally comes up with as a conflict resolving mechanism. It doesn't have anything to do with geographical realignment or nomenclature or any-

thing of that kind. It is solely a matter of what is to be the conflict resolving mechanism.

Mr. PETRIE. Well, with all respect, Mr. Westphal, that analysis should lead this subcommittee to a realignment proposal that does not sever California. You are asking me to compare Judge Kilkenny's proposal to the basic proposal of the Hruska commission.

Mr. WESTPHAL. I understand what you are saying, but what I am suggesting to you is that I don't think the word is sever. What you are suggesting to us is that we should not come up with a proposal which would allow conflicts of opinion between your four district courts to result in conflicts of opinion at the circuit level which cannot be readily resolved in one fashion or another, I assume, preferably without the insertion of a fourth-tier court and without the need of relying on review here in Washington every time you get a case which you feel presents a conflict. As we all know, the Supreme Court of the United States doesn't always agree with the lawyers when they analyze a situation and proceed. Isn't that basically what it boils down to?

Mr. PETRIE. Well, it is one way to look at it, Mr. Westphal.

Mr. WESTPHAL. Well, yesterday Jordon Dreifus agreed that that final analysis was the real concern, and suggested that we not get carried away by names and some of these other things. He suggested that we should concentrate on the central function of the judicial system at the appellate level, which is that of reviewing actions taken in the trial courts. If that review results in conflicts, whether intercircuit or intracircuit, there must be a mechanism for readily and speedily resolving those conflicts. Isn't that the real problem we face as we try to develop structures that can employ more than 9 judges or no more than 13, 15, 18, 19, or 20, in order to handle what we all recognize as a vast caseload?

Mr. PETRIE. Certainly we should provide for the resolution of conflicts. It is a hard choice, I agree, but the real question is, how are you going to do it?

Mr. WESTPHAL. Well, that has to be done in some fashion. That conflict has to be resolved, whether it is intracircuit or intercircuit.

Just a couple of things here to kind of clean up the left side of my yellow pad.

On page 3 of your report, as well as page 6, there is reference to the 5-month figures from calendar year 1974, which we had talked about in relation to the 8-month figures earlier. I would just like to point out, for the sake of clarifying the record, that the first 5 months which you referred to on page 3 and on page 6 were in fact the last 6 months of fiscal 1974, and the Administrative Office figures that the caseload in that fiscal year in fact increased by 16 percent.

Mr. PETRIE. I am aware of that.

I wonder if I might give you the figures, Mr. Westphal, for these 8 calendar months of 1974.

Mr. WESTPHAL. These are the figures furnished you by Mr. Luck?

Mr. PETRIE. Yes.

Judge KILKENNY. Mr. Westphal, I am going to have to catch my plane. Would you mind if I left now?

Mr. WESTPHAL. Not at all, Judge. Thank you for coming.

Mr. PETRIE. In the first 8 calendar months of 1974 there were 1,723 filings as against 1,746 filings in the first 8 calendar months of 1973, so that is a little less, 23 less. There were 1,765 terminations in the first

8 calendar months of 1974 as against 1,543 or 222 more terminations in the first 8 calendar months in 1974, and that gave me the net gain on the backlog of 245. I thought, if you didn't get them from any other source, you might like to get them from me.

Also, according to the fiscal year 1974 figures, California is now contributing not quite two-thirds of the filings, but 64.2 percent of the filings in the ninth circuit.

Mr. WESTPHAL. Then one last thing, and that is that I couldn't quite let go your remark that the report of the Hruska Commission has done more to unify the State of California than anything in recent years. The reason I can't let that go by is that it reminds me of my experience in the Marine Corps some 30 years ago. On the weekends when we hit a liberty port we could go into a bar, and, if there were two marines and only two marines standing alongside that bar, they could get into a pretty good argument about the merits of the Marine Corps or of their respective outfits, but never let a soldier or sailor come along and agree with one or the other because then the two marines would jump on the soldier or sailor and all hell would break loose. This is reasonably analogous to the way in which you are suggesting the organized bar is reacting in California, isn't it?

Mr. PETRIE. Well, it is somewhat analogous, but—

Mr. WESTPHAL. You also spoke of the diversity within the State of California, and I think we all realize it is based in part upon the diversity between the north and south. Historically that has been true of California, politically, economically, with respect to water and oil.

I think your committee has done an excellent job and has recognized the seriousness of the problem. You have done your best to offer an analysis of it and to offer alternatives, and I think that fact demonstrates the difficulty of the ultimate choice Congress will have to make; do you agree with that?

Mr. PETRIE. Yes; we think it is a hard choice.

Mr. WESTPHAL. But no matter how hard the choice, there is a real, urgent need for additional judge power to be applied to the caseload in the ninth circuit and that need must be met, as you suggest, in a fashion which meets three criteria. No. 1, we must realign on a basis that will promote the desired regionalism in the Federal court; No. 2, we must come up with a base upon which we can build a system of Federal appellate review that might last for some 15 or 25 years; and No. 3, our decision should be one that is not locked in by any concept that there is some magic in the number nine. Is that a fair summary?

Mr. PETRIE. Yes; those seem to us to be the principal considerations, Mr. Westphal. If we can offer any further input to the subcommittee's consideration, I hope we will be able to do that. Can we do so by directing a letter to you?

Mr. WESTPHAL. I think if there are any points we have not covered you can direct that letter to the chairman of the committee, with perhaps a copy to me. We usually make it known to all members of the subcommittee.

I want to thank you, Mr. Petrie.

Mr. Chairman, I think, then, we are ready to stand in adjournment until 2 o'clock.

Mr. PETRIE. We of the San Francisco Bar Association appreciate very much this opportunity to exchange views with you, Mr. Westphal, Mr. Chairman.

[Whereupon, at 12:35 p.m. the subcommittee recessed to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Senator BURDICK. Our next witness will be Mr. Cleary S. Cone, past president of the Washington State Bar Association.

Welcome to the committee, Mr. Cone.

STATEMENT OF CLEARY S. CONE, PAST PRESIDENT, WASHINGTON STATE BAR ASSOCIATION, ELLENSBURG, WASH.

Mr. CONE. Thank you, Mr. Chairman.

I appreciate very much the opportunity to appear before the subcommittee.

I, as you just stated, am the past president of the Washington State Bar Association, a unified bar association of approximately 6,000 members.

The Washington State Bar Association appeared through a number of witnesses before the Commission at its hearing in Seattle, and we spoke at substantial length at that time with respect to the grave problems stemming from the difficulties of the present ninth circuit.

I would like to make it clear at the outset that we have the greatest respect for the individuals on the Commission. We have the greatest respect for the quality of their deliberations, and we agree wholeheartedly with their basic conclusion, that is that the ninth circuit must be divided and a new circuit must be created, and not on the basis of some sort of a divisioning of an existing and continuing ninth circuit.

I think it would serve no purpose to reiterate the reasons for that position, because the Commission has itself covered that well in its report and had heard broad testimony with respect to it.

The question I think is not whether the circuit should be divided or whether a new circuit should be created, but *how* the circuit should be divided and *what kind* of a new circuit should be created.

We recognize, Mr. Chairman, that there isn't any solution to this problem, no matter how Solomon-like it might be, that would be satisfactory to everyone. I think this has elements similar to the budget battle connected with it. Everyone is anxious to see something done but not to them.

At the same time there is a different aspect here. That aspect is that the objections that you are hearing are coming from bar associations. They are objections coming from professionals, and I think, Mr. Chairman, we must recognize these objections are very highly principled objections, based not simply upon provincialism or upon some effort to maintain a status quo with respect to stature, but are highly principled objections based upon serious concerns about the effects of the method of division of the circuit that has been recommended by the Commission.

I think that because of the obvious quality of those objections they should not be taken lightly, and I don't mean to suggest they are being taken lightly. But I think that the gravity of the problem is such that arithmetical niceties are a secondary consideration and the best solution is that which best accommodates the conflicting interests of the jurisdictions which will be affected by division of ninth circuit.

The Commission has concluded that no circuit should consist of less than three jurisdictions, and that under no circumstances should California comprise an entire circuit. The Commission, unfortunately then went on, from a preponderance of filings in California, to conclude that it was necessary to divide California between two circuits, and really all else, I think, in the Commission's report flowed from that conclusion. Because of the number of filings in California, you had to divide it; Arizona and Nevada being added to the southern portion of California was just incidental, and, similarly, all the rest of the jurisdictions fell into line because of that basic conclusion.

With respect to the Commission's conclusion that California should be divided, the subcommittee, I am sure has had substantial objections. I do want to add the objections of the State of Washington to that list. I think that while the State Bar of California, in connection with their objections to the Commission's report, and some of the local bar associations of California, in varying degrees, suggest that the circuit ought to be retained as it is, or that some try should be given to this divisioning process, I think it is fair to say, and I don't mean to speak for them, but I think it is fair to say their objection is basically to the division of California between two circuits. There are obviously unsatisfactory aspects to this divisioning with respect to a chief judge and two assistant chief judges, but they regard anything as being preferable to a division of the State between two circuits.

Washington's State Bar Association, and the State Bar Associations of Idaho and Alaska have for some time strongly favored the creation of a new circuit which would not include any part of California. The Oregon State Bar Association and the Montana State Bar Association have both stated they would have no objection at all to inclusion in such a circuit. There is a rather overwhelming preponderance of objection from the professionals, and from the bar associations, which I think fairly can be said to reflect concerns not merely from the standpoint of their interests but from the standpoint of their clients, in overwhelming opposition to the Commission's report.

The Washington State Bar has consistently favored the creation of a new circuit which would consist of the five Northwestern States of Alaska, Washington, Oregon, Nevada, and Montana, together with such other jurisdictions as would make the division more feasible. We now specifically recommend to the subcommittee that a new circuit be created consisting of those five Northwestern States together with Nevada and Guam. Mr. Chairman, a very good case can also be made for substituting Hawaii for Nevada. The creation of such a new circuit would not achieve mathematical parity.

It would, however, answer, first, the problem and the serious objections of California to a splitting of that State. In addition, the retention in the present ninth circuit of California, along with the two other jurisdictions of Arizona and Hawaii would answer the objection of the Commission that no circuit should consist of less than three jurisdictions. The representatives of the California bar have stated their objections to the splitting of the State, and representatives from Arizona and Hawaii would be more competent than I to comment with respect to their inclusion in the three-State circuit with California but I think it very unlikely there would be serious objection to that inclusion. I have no way of knowing, with respect to that three-State

circuit—which would be handling a caseload roughly three times the size of the new circuit that we recommend be created—I have no idea what the attitude of that three-State circuit might be with respect to experimenting with some sort of a divisioning process, although one would hope it would have a more solid foundation than some of the suggestions I have heard with respect to it.

I must, I think, obviously, Mr. Chairman, address myself to the Commission's attitude toward the creation of a northwest circuit. The proposal that I am making has, I think, clearly the advantages of meeting the desires of the great majority of the jurisdictions involved, particularly it is consistent with the overriding concern of the State of California and its various bar associations that it not be divided.

The Commission, as you are of course aware, recommended against a creation of a northwest circuit at this time, based upon the fact that it did not have a sufficient caseload. I would point out that the circuit that we are recommending at this time consist of two additional jurisdictions beyond that which was considered by the Commission in its report. I point out further that the Commission, in its report, was referring to the creation of a northwest circuit that had a caseload of 17 percent of the circuit and had, based upon the last statistics available to them at that time—the 1973 fiscal year statistics—only 382 filings. I think their conclusion about the creation of a circuit with only 382 filings was quite understandable. They did, however, in answer to the vast amount of testimony they had heard with respect to developing activity, indicate that, should the projections be borne out, a separate circuit for the four or five Northwestern States might become appropriate. I am puzzled how one gets only four Northwestern States, but I am assuming that that was just not a matter of significance.

Now, what we are talking about is not four States or five States but six States plus the territory of Guam. I must point out, Mr. Chairman, that the filings in fiscal 1974 in those seven jurisdictions were not the 382 that were considered by the Commission when recommending negatively on such a circuit, but filings which amounted to 639. Incidentally, when I refer to the figure 382, that is the 1973 statistic which carried into effect the change in statistical method to include administrative appeals and original proceedings. In 1961 the entire ninth circuit had only 443 filings. In fiscal 1974, the proposed new northwestern circuit had 639 and, even after taking into account the adjustment for statistical changes, the filings in this new circuit would exceed by about 40 percent the filings in the entire ninth circuit only 13 years ago when it functioned as a seven-judge circuit court.

In addition, Mr. Chairman, the lawyer population, the population in general and the economic activity of the jurisdictions that would comprise the new circuit are growing much, much faster than the national average. There is every reason to anticipate that not only will there be an increase in filings, but that there will also be a sharply accelerated rate of increase in filings.

I think it is also significant to note that, within the framework of that increase, it should be borne in mind that the jurisdictions involved in such a seven-jurisdiction new circuit are uniquely involved in what I guess one could call the environmental battle, the strife between development of energy, increased economic activity, and a desire to maintain a particular form of life. And that desire to maintain a life-

style, to maintain the ecological balances, has certainly been reinforced by Federal legislation. I think it is inevitable that this is going to provide the Federal court system in such a new circuit with a substantial number of intricate and difficult cases.

It is, I think, not an accident that between 1972 and 1974, there was a 40.7 percent increase in filings in this proposed new circuit, as compared with an increase in filings in the three States which would be left in the ninth circuit under our proposal of only 13.7 percent. I have made some inquiries to try to determine whether there was some sort of statistical anomaly involved there. I have not been able to elicit any response that would indicate that there is any anomaly. It is simply that the filings are growing much faster in those jurisdictions.

We, therefore, must respectfully disagree with the recommendation of the Commission and with its conclusion. The creation of a new northwest circuit, with the addition of the two jurisdictions I have indicated, would, in our judgment, at this point, have an ample workload to support at least a five-judge appellate circuit.

I must say that one of the things that struck me, Mr. Chairman, as I reviewed this matter and went through a vast volume of material, is the fact that, while the Commission's basic undertaking here is to try to arrive at a solution which will be a long-range solution, the statistical matters that appear and what I know of the area that is involved are simply inconsistent with what they have recommended being a long-range solution. There has been a good deal of talk in the course of the presentation, and in the questions, about an ideal ninth circuit, or a circuit that ideally would not exceed nine judges, about an effort being made to try to retain some degree of collegiality in connection with this. I think it is very significant that, if one looks at the Commission's proposal, looks at the increase in filings, considers the developments that are going on now in connection with products liability, environmental protection, consumer protection, and more refined concepts of due process, one inevitably has to come to the conclusion that before any legislation is passed to remedy this problem—even if it were passed precisely as the Commission has recommended—neither of those circuits would be able to function as collegial courts. We are starting out with a number of filings, with normal increases, that will provide a caseload that will be too heavy for a nine-judge court.

Now, my proposal on behalf of the Washington State Bar Association for creation of the seven-jurisdiction circuit allows for a degree of expansion, starting with a five-judge circuit court, up to that optimum of nine. I think it is a proposal which can stand on its own. I think it is a tenable proposal, and I think that, considering the lapse of time that is involved in getting the matter adjusted once a problem becomes a problem, the time to do it is now, before it achieves crisis proportions.

Now, I will anticipate a question. I cannot give you a perfect answer to it. That is part of the Solomon-like problem that the Commission has and that the subcommittee has. The pertinent question, obviously, is that, assuming, as I think you can fairly assume, that the creation of such a circuit as I have suggested—the seven-jurisdiction circuit—is warranted, what does that do for the three-State circuit that is left which would have, based on fiscal 1974, 2,000 filings? How about that? Well, my answer I think has to be the kind of answer I dislike, essenti-

ally a negative type of answer. I think that the subcommittee and the Congress is beaten before it starts, on the concept of trying to create two circuits with a maximum number of nine judges. I just think the statistics and the direction in which things are going makes that impossible. This I guess means either a fragmentation of the circuit into more than two divisions—and I don't like to keep confusing the issues by referring to divisions, but a splitting of the circuit into more segments than two—or it means setting up a northwestern circuit with the two additional jurisdictions and supplementing the other circuit with this divisioning process that has been suggested with refinements as can be brought to it.

But I do feel that the Commission's suggestion will be obsolete before it ever becomes law and ever is implemented, just as the 1968 statistical study became obsolete years before the time covered by it.

I think I have said all I can say about it, Mr. Chairman. I don't believe any purpose could be served by my reading my statement. You have it in front of you.

Senator BURDICK. Thank you very much, Mr. Cone, we will place your prepared statement in the record at the conclusion of your testimony.

Your business comes from—I am talking about the circuit court—is fed by the business in the district courts, and we have been hearing from the district courts in dealing with various procedures that might ease the burden down there. The Administrative Office reveals that the caseload in the district courts for the past 2 years has actually gone down and maintained kind of a plateau for these 2 years. What makes you think there is going to be a rapid increase in the business of the circuit, then?

Mr. CONE. There just apparently has been. If filings in those jurisdictions, if appellate filings have increased 40.7 percent in that 2-year period—

Senator BURDICK. But you haven't yet felt the impact of the plateau having been established in the district courts

Mr. CONE. Well, I don't have the statistics on the number of trials or the number of filings on proceedings in the district court level, so I am not in a position to challenge you or that. I would be most surprised—

Senator BURDICK. This is nationwide. I don't know to what extent your State has experienced this. This is a generalization of the country as a whole.

Mr. CONE. Oh, well, the country as a whole. I found it incredible with respect to the jurisdictions I am talking about.

There is a quickening of activity. There is more population growth in those jurisdictions than is true nationwide. The lawyer growth has an impact. It may seem strange that it does, but the growth in the number of lawyers does have an impact on the amount of litigation that goes on.

The bars in the area that we are talking about are growing at a 10-percent compounded rate, far greater than anywhere else, and the economic growth rate is tremendous. When one considers the commerce between Oregon, Washington, and Alaska and when one considers the impact of the pipeline, it is very significant.

Very recently there was another district judgeship authorized for the western district of Washington. I do know that as late as 1973 the

State of Oregon's district court judges on a trial basis were the most overworked of any in the United States, so I think the nationwide statistics are not applicable to the area.

Senator BURDICK. Well, we'll let this pass for a while.

You say that if we just divide the circuit the way the Commission recommended, we are lost from the start?

Mr. CONE. I think so.

Senator BURDICK. Then you are recommending three circuits?

Mr. CONE. Well, the position that I am specifically authorized on behalf of my bar association to recommend in the creation of the seven-jurisdiction circuit that I have recommended to you. On a purely personal basis, I am concerned in general with where we are headed in the Federal appellate system, and I think it involves a basic expansion of both what are considered to be rights and the ability of people to pursue those rights. This reflects itself in a variety of things that I have just mentioned, environmental protection, consumer protection, more refined concepts of due process. In addition to this, the law schools are crammed with people who want to be lawyers. The number of young people coming into the profession is unprecedented. Furthermore, I think we can say that these young lawyers are coming into the profession with a zeal to litigate, and to litigate on many of the social and environmental issues that legislation is now providing new avenues for litigating.

Senator BURDICK. We understand all that. I understand the problem.

The question is, if we give you your northwest circuit, that will solve your problem for a while, but what about the problem of the California area, which is a real problem?

Mr. CONE. It isn't any more real than ours, Mr. Chairman, because we are suffering from the delay and the inefficiency of that area just as much as anyone else.

Now, with respect to California, I don't know whether—this is a threshold proposition, and I don't feel I want to speak to California. By threshold proposition I mean the concept of taking a State and dividing it between two circuits. The California people who object to that being done see some merit in considering this divisioning thing. I would rather they would speak to that.

I would say, clearly, from the standpoint of the Washington State Bar Association, talking in terms of setting up a divisioning of the entire circuit, we think it is a bad idea. But what is right for that three-State circuit that I am recommending be left, I would much rather have them respond to.

The point I am trying to make with this is that——

Senator BURDICK. The point is you have your problem solved but you have left us with another problem.

Mr. CONE. No, because I think the solution recommended by the Commission, that is taking this circuit and dividing it virtually in two, I don't think that is a solution. I don't think that solves it either for California or for the Northwestern States, because I think that within a matter of 3 or 4 years both of those new circuits would find it impossible to function without an excessive number of judges.

Senator BURDICK. Well, if we don't divide it, the problem will be even worse, won't it?

Mr. CONE. I agree. If you are looking for a personal opinion I guess ultimately we are looking at more than two circuits, covering 30 million people.

Senator BURDICK. Counsel, do you have some questions?

Mr. WESTPHAL. Yes, Mr. Chairman.

Mr. Cone, your recommendation on behalf of the State Bar of Washington is for the creation of a separate circuit, with the five so-called Northwest States plus Nevada and Guam. You indicated that that circuit could be altered by substituting Hawaii for Nevada, which wouldn't make much difference. Basically your proposal is to have the five Northwest States, plus Nevada and Guam, a six-state and one-territory circuit, so to speak. The figures indicate that that alignment would have had total filings in 1974 of 639 cases. That would mean, then, under your recommendation, that a three-State circuit consisting of California, Arizona and Hawaii would have 2,056 filings. So that that three-State circuit under your recommendation would have 228 filings per judge, which is larger than now. And of course, there is no arguing with the figures that I have available and which all the exhibits show.

Mr. CONE. So that we don't misunderstand, I am not concurring that that circuit should attempt to operate with that number of judges.

Mr. WESTPHAL. I understand, because I take it you recognize that 228 incoming filings per judge is an unbearable load for any appellate court to have.

We have had a suggestion—I believe it was last week when Chief Judge Brown of the fifth circuit testified—that we might use a common factor in analyzing these caseload filings. He suggested that the 1973 average filings per judge for the Nation as a whole be used as a factor in dealing with these statistics. That figure was 161 cases per judge.

Now, then, under your recommendation, if we wanted to have that three-state circuit with 2,056 filings operate at a load of 161 filings per judge, that would require 13 judges. In your six-State-plus-one-territory circuit would you recommend, with 639 filings divided by the same standard of 161 filings per judge, a bench of four judges?

Mr. CONE. If you stopped tomorrow.

Mr. WESTPHAL. All right, if you stopped tomorrow. You indicated there is some apprehension that the load may increase. But if it increases for your northwest circuit it will also most likely increase for this three-state circuit and eventually, in order to sustain the same level of filings of 161 per judge, those three States would have to go above the number of 13 judges.

Mr. CONE. I think it is likely it would increase. Statistically, it would appear it would increase in the new circuit at a much higher rate.

Mr. WESTPHAL. So that, basically, what confronts the subcommittee as we look at this suggestion is that we have heard, in 3 days of testimony, that the ninth circuit, which has had 19 judges for the last 3 or 4 years, not only has not been able to keep pace with its caseload, but the mere fact that they have had to operate with the equivalent manpower of 19 judges has given rise to delay and intracircuit conflicts which members of the bar and the judges alike seem to object to.

My question to you is, do you really seriously suggest to the subcommittee that in adopting your recommendation—which would be to create a three-State circuit of California, Arizona and Hawaii on the

one hand and the Northwest States on the other hand—we should go ahead and authorize 13 judges to handle the caseload on that three-State circuit?

MR. CONE. Well, you are incorporating several things in your question that I am not willing to buy as part of a whole.

First, I don't necessarily agree at all with Judge Brown's assertion about 161 cases per judge being an appropriate level. I am not so sure that people in general are that happy with the performance of the Federal appellate system, and I suspect a primary reason for it is because of the excessively heavy caseload. So starting right off the bat, I don't accept that.

Secondly, taking your 13 and 4 proposition, which is structured obviously to that assumption of Judge Brown's figure of 161 as being an optimum figure, obviously, if the caseload is lower, then we are talking about more than 13 and more than 4, and I think we ought to be talking about more than 13 and more than 4.

But the point I am trying to make here is that, when I said we were licked on this proposition before we started, I mean that if we use this thing—that nobody likes except the Commission—of dividing California in two and tacking these other States on, we are still dealing with the same kind of caseload and the same number of judges. Taking your figures, you need 17 judges for this circuit to handle its caseload now. Cut it in two the way the Commission is talking about and you are starting out with two new circuits of 8 and 11 judges respectively, and before you get the job done it will be 13 and 15 respectively. My point is that this thing isn't going to happen this year. These case filings are going to continue to go up. That is the problem.

The chairman's question is, what do I think should be done about the three-State circuit which you labeled a 13-judge circuit? I think something further has to be done with it, but I would like to hear that question answered by others, not by me speaking from the standpoint of a Washington lawyer. I would like to hear that question answered by the California people, the Arizona people and so forth.

MR. WESTPHAL. Well, of course, we have heard from the California people and the Arizona people.

I will just pursue this line a little bit further.

You have suggested that we are licked before we start because we inevitably get into a large number of judges and a large caseload which may be as unmanageable with any number of judges as the number we started out with before we even start to realign. You suggest then, perhaps, that what the subcommittee will have to think about, instead of having two segments to solve the problem in the ninth circuit, is having three segments. Let me just suggest to you that, if we have one segment consisting of the five Northwestern States we would then have a caseload of 475 for those five Northwestern States. If a second segment consisted of all other States except your five Northwestern States, and except California, you would then have a circuit of Arizona, Nevada, Hawaii, and Guam, a three-State circuit with total filings of 483 just about what you will have with the five Northwest States. But your third segment, then, still consists of California with 1,737 filings which again, if we only had nine judges, would result in almost 200 filings per judge. That is quite a change from the existing situation, and can only be brought down to a figure of 161 filings per

judge—which as a factor used by way of example—by the employment of more than nine judges to work on that caseload generated just in California alone. So that, viewed from that suggestion of three segments, again, it boils down to what can you do to handle the caseload that comes out of California alone?

Mr. CONE. I don't know what you can do about the caseload that comes out of California. What I am saying is, I think to adopt the Commission's recommendation to split the circuit into two segments at this time simply does not really address the problem, because you will then have two circuits both of which start out overloaded.

Obviously the question of what to do about California, either now or at some time in the future, is a critical question. Frankly, I don't know what to do about California.

Mr. WESTPHAL. I hope the subcommittee and Congress in turn can figure out what the solution is. But let me clarify one last point as to what the real position is of the Washington State Bar and these other several States that you have told us are in substantial agreement with you.

Mr. CONE. Pardon me. So there will be no misunderstanding, I have not solicited an opinion from any other than the five States that I have mentioned.

Mr. WESTPHAL. In response to one of the Chairman's questions you stated that your constituency does not like the Hruska Commission recommendation, which would align you with part of California, because you are afraid that, if you are aligned in any way with part of California, you will continue to suffer from the delay and inefficiency which you are currently suffering under in the existing ninth circuit. Is that basically what you said?

Mr. CONE. I don't think that is what I said.

At least—if I understand the Chairman's question—it had to do with our being part of a division of the ninth circuit and had something to do with the use of our district court judges as a blood bank for the California situation. "Bloodbank" is a term I have heard. In any event, I may simply have not understood the question.

Mr. WESTPHAL. What I am trying to get down to is this: I take it that your basic recommendation is that you would like to see a northwest circuit. Whether it is composed of five or seven States doesn't make much difference, but you would like to see that northwest circuit.

Mr. CONE. That is correct.

Mr. WESTPHAL. And the reason for that, I assume, is not local or regional pride, but rather a desire to gain something that you would not have by reason of either the Hruska proposal or the Kilkenny proposal, which would both have your five States assigned with all or part of California?

Mr. CONE. Yes, that is correct, and—to clarify my problem a moment ago in responding—it isn't having part of California—I think to a degree you did misdirect me—it is not having part of California involved in that circuit at all. It is starting out as part of a new circuit that has the number of filings that that new circuit would have in it by the time it ever came into being. Before we even got off the ground we would be an overloaded circuit for the number of judges that would be afforded us, and we would be essentially in the same boat that we are in now. But this is not a matter of resentment or concern that somehow California would dominate or that California, part

of California, would be draining off the judicial resources. It is simply that I think there would be too many filings with the kind of growth that is going to occur in the north.

Mr. WESTPHAL. In other words, you like California, but you just don't like the caseload that goes with it?

Mr. CONE. No; not the caseload that goes with California itself, the caseload that goes with a circuit that is that big.

Mr. WESTPHAL. Judge Duniway's figures, and the Hruska Commission's figures, indicate that the Northwest States, plus Hawaii and Guam and the two northern districts in California, would have a caseload of 1,159 filings, according to the 1974 figures. That is a beginning caseload, and eventually the nine judges would have 129 filings. Now, certainly 129 is an acceptable and manageable caseload, is it not?

Mr. CONE. It is as long as it stays 129; yes.

Mr. WESTPHAL. So that really, again, it isn't out of any idea of provincialism or local pride that you urge that the five Northwest States be consolidated into one circuit; rather, it is your concern that whatever assignment is made results in a structure where the appellate judges employed on that work have a manageable caseload that they can deal with with relative efficiency and dispatch, rather than the relative delay and inefficiency which has been a characteristic of the ninth circuit for the last several years. Is that a fair statement?

Mr. CONE. Yes; that is a fair statement to make, assuming that that caseload can be achieved in a new district without an excessive number of judges.

Mr. WESTPHAL. Do you have any extra copies of your prepared statement or remarks that you can leave?

Mr. CONE. I delivered 20 to the staff.

Mr. WESTPHAL. Thank you. It will be made a part of this record. That is all the questions I have, Mr. Chairman.

Senator BURDICK. Thank you, Mr. Cone, for coming today.

Mr. CONE. Thank you very much for the opportunity to appear.

If I might make one more comment, perhaps I touched upon this in the statement. Maybe I seem preoccupied with the consequence of the lapse of time that is involved, but it is significant, I think, that there was real attention turned to this in about 1970. Between 1970 when that occurred and 1974, the filings in these seven jurisdictions that I am talking about doubled, and we haven't arrived at a solution yet.

It seems to me that my preoccupation with the belief that delay will occur in the future is not unrealistic.

Senator BURDICK. We will check the Hruska Commission proposal very carefully, and we will try to act quickly.

This meeting will now be adjourned subject to the receipt of those various documents authorized to be received at a later date.

[EDITOR'S NOTE.—Mr. Cone's prepared statement, mentioned during his testimony *supra*, follows:]

PREPARED STATEMENT OF CLEARY S. CONE ON BEHALF OF THE WASHINGTON
STATE BAR ASSOCIATION

My name is Cleary S. Cone and I am the immediate past president of the Washington State Bar Association. I am appearing before you at the request of Mr. Kenneth P. Short, the incumbent president of the Washington State Bar Association, to express the position of that Bar on the recommendations of the Commission on Revision of the Federal Court Appellate System as they pertain to the Ninth Circuit.

At the hearing conducted by it in Seattle, Washington, the Commission received detailed testimony from numerous representatives of the Washington State Bar Association with respect to the unwieldiness of the Ninth Circuit as presently constituted, and the severe problems resulting therefrom. We wish to commend the distinguished members of the Commission for their patient and painstaking approach to the difficult task assigned to them. Although the Washington State Bar Association advocates a different solution to the problem of the Ninth Circuit than the solution recommended by the Commission, I want it to be clear that we have the greatest admiration and respect for the members of the Commission and the quality of their deliberations.

We wholeheartedly agree with the conclusion of the Commission that the problems stemming from the present composition of the Ninth Circuit into two that the only solution lies in dividing the present Ninth Circuit into two circuits. Because the record upon which the Commission made its findings is so broad and so complete, and because, in my opinion, the Commission's basic conclusion cannot be validly challenged, I will not restate the arguments, concerns and complaints which led the Commission to its conclusion. Instead, with complete acceptance of the Commission's conclusion that the Ninth Circuit must be divided, I will address myself entirely to the question of how it should be divided.

At the outset, it must be recognized that there is no solution, however Solomon-like, that will not be objectionable to some individuals and some organizations. It is important to bear in mind that the positions of the various state and local bar associations in opposition to the Commission's recommendation are highly principled objections based upon basic concerns about adverse effects which would flow from the division of the Circuit as recommended by the Commission. We believe that because of the quality of the objections, they should not be taken lightly. We further believe that the best solution to the problem is that solution which best accommodates the conflicting interests of those jurisdictions which will be affected by a division of the Ninth Circuit.

The Commission has conducted that no circuit should consist of less than three states, and that under no circumstances should California comprise an entire circuit. The Commission has further concluded, because of the preponderance of filings from the State of California, that in order to split the Ninth Circuit it is necessary to divide California between two circuits. The retention of Arizona and Nevada with the southern portion of California in one circuit flows almost incidentally from the conclusion of the Commission that the State of California must be split, and the addition of all of the rest of the present Ninth Circuit to the northern portion of California is similarly incidental to the conclusion that California must be split.

The State Bar of California and local bar associations in California are flatly opposed to the division of California between two circuits and have fully and persuasively stated their reasons for opposition. In some instances, it has been recommended that the circuit be retained as it is presently constituted, and in other instances it has been recommended that there be administrative divisions within the circuit. It is clear, however, that the opposition of the California state and local bars is to the division of California between two circuits and not to the creation of a new circuit consisting of states other than California.

The State Bar Associations of Washington, Idaho and Alaska all strongly favor the creation of a new circuit, which would not include any part of California, and the State Bar Associations of Oregon and Montana have both stated that they have no objection to the creation of such a circuit.

In short, it would appear that there is a great preponderance of opposition to splitting the circuit by dividing California and by adding various states to each of the two segments of California.

The Washington State Bar Association has consistently favored the creation of a new circuit which would consist of the five northwestern states of Alaska, Washington, Oregon, Montana and Idaho, together with such additional entire jurisdictions as would add to the feasibility of such a circuit. We now specifically recommend to this subcommittee that a new circuit be created consisting of the five northwestern states above mentioned, together with Nevada and Guam.

The creation of such a new circuit would leave a Ninth Circuit consisting of California, Arizona and Hawaii which would meet the three-state criterion established by the Commission. It is true that the filings in the reduced Ninth Circuit would be, at least for a time about three times as high as in the new circuit which we are recommending. While relative rates of growth and the degree to which that balance would be maintained are somewhat uncertain, there is no reason, in the face of the differing interests and concerns of the jurisdic-

tions affected, why the division of the circuit must be dictated by arithmetical equality. Representatives of the California Bar have stated, or will persuasively state, their objections to the splitting of their state between circuits. Representatives of the Arizona and Hawaii Bars are patently far more competent than I to state their position on inclusion in a three-state circuit with California. It may well be that the creation of administrative divisions in that three-state circuit will be looked upon with favor by the bars affected, and it may be that such a device might be helpful and far less disruptive in the unique situation of California than would be a parceling out of that state between circuits.

The recommendation of the Washington State Bar Association that a new circuit be created consisting of the five northwestern states together with Nevada and Guam is consistent with the overriding interests of California in being left intact within a single circuit. More basically however, it is a proposal which is desirable on its own merits.

The Commission expressed the conclusion that a separate circuit for the five northwestern states is not now warranted because of the relatively small number of filings, which the Commission computed as 17% of the work load of the circuit. The addition of Nevada and Guam, of course, increases both the number and the percentage of filings.

However, there are two far more basic responses which must be made to any contention that such a new circuit would not have a sufficient work load.

First, it should be noted that in 1961 the entire Ninth Circuit had only 443 filings. In fiscal 1974 the proposed new circuit had 639 filings. Even after taking into account the adjustment in statistics to reflect original proceedings and appeals from administrative agencies, the filings in the new circuit would exceed by about 40% the filings in the *entire* Ninth Circuit only 13 years ago.

Second, the lawyer population, the population in general, and the economic activity of the jurisdictions which would comprise the new circuit are growing far faster than the national average, and there is every reason to anticipate not only an increase in filings, but an accelerating rate of increase in filings. Within the framework of that increase, it should be borne in mind that the conflicts between the burgeoning development of natural resources and the reinforced desire to protect the ecology will be uniquely productive of intricate and important litigation. It is no accident that between 1972 and 1974 there was a 41.7% increase in filings in the proposed new circuit, while the increase in filings in the same period in the three states which would be left in the Ninth Circuit was only 13.7%.

We must therefore, respectfully but forcefully disagree with the Commission's conclusion that the creation of such a new circuit is not now warranted. The work load is now sufficient and it is only realistic to anticipate a continuation of the accelerating rate of growth in that work load.

The lapse of time between the emergence of a serious problem of judicial overload and the time of its cure is so long that the problem attains crisis proportions to the detriment of all interests affected by it. Between 1970, when attention became focused on the problem, and now, when legislation to cure the problem is still at least a year away, the filings in the proposed new circuit have approximately doubled. For that reason, if for no other, it would seem apparent that the time for the creation of a new circuit consisting of the five northwestern states together with Nevada and Guam is now.

[EDITOR'S NOTE: Following these hearings, Judge Shirley M. Hufstedler of the Ninth Circuit Court of Appeals asked that the following prepared statement be made a part of this record:]

PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER, U.S. CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to express my views opposing the Recommendation of the Commission on Revision of the Federal Court Appellate System that the Ninth Circuit should be split and that the split should be made by dividing the Circuit into a new Twelfth Circuit encompassing the Central and Southern Districts of California and the States of Arizona and Nevada, and a new Ninth Circuit consisting of the Northern Districts of California, and Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Guam.

I agree with the Commission that the Ninth Circuit is seriously overburdened. Judge Duniway of our Circuit has accurately described the impact on our Court

of the appellate litigation explosion during the last decade. I also agree that we need five more judges. I strongly disagree that circuit division will resolve or ameliorate our problems; rather, I believe that splitting our Circuit will create more difficulties than it solves.

A limited number of options are available to relieve any overloaded intermediate appellate court: (1) horizontal expansion—that is adding judges to the existing court; (2) vertical extension—that is elongating the appellate ladder by adding a new tier of appellate courts at any level below the apex of the judicial system; (3) reduction of the intake of litigation at the trial level or at the appellate level; (4) increase in nonjudicial personnel to take on functions formerly handled by judges; (5) increase per-judge output by altering internal procedures, such as caseload management, calendaring adjustments, adding supporting hardware (e.g., dictating equipment, typewriters, telex, computers,) and by changing the traditional appellate process (e.g., decreasing opinions, reducing or eliminating oral argument, and unifying reviewing procedures.)

Circuit splitting does nothing to decrease the flow of appellate litigation; indeed, the tendency of circuit splitting is to increase litigation. Dividing the same litigation burden into two stacks obviously does not decrease the total. Less obviously, multiplication of circuits generates intercircuit disharmony and conflict. Lack of certitude about the law breeds more appellate litigation. It is no secret that litigants having the power and the means to relitigate an issue that has been lost in one Circuit will raise the same issue in other Circuits seeking to generate a conflict. Not only do large corporations engage in this tactic, the United States regularly does so as well.

Circuit division has no beneficial impact on reforming internal management procedures, or increasing nonjudicial personnel to take on functions that have been (but need not be) performed by judges, or altering traditional appellate process. To the extent that geographical splits are not wholly neutral, divisions may delay needed reforms because they may reinforce the illusion that nothing need to be done.

What is there about geographical division that produces any benefits? Supporters of circuit division say that it will permit the addition of more judges and that it will increase the per-judge output.

The former argument has two premises. The unarticulated premise is that Congress will be more amenable to the creation of the necessary judgeships if there are two circuits growing in the place of one. No one has explained why this is or should be true. I am unable to do so.

The second premise is that no more than "X" judges can function effectively and efficiently on a single circuit. "X" is usually nine. I quite agree that a nine-member court is pleasant, and, in the best of all appellate worlds, it may even be ideal. Unfortunately, we do not live in an ideal appellate world, and we cannot expect to do so because the amount of appellate litigation now before us and the increased burden on the horizon forbids that result. Unless the Circuit is fragmented, rather than bisected, we cannot realistically anticipate that the California load alone can be carried by nine judges.

A much more serious charge is that expanding the court beyond nine renders the court unmanageable because the multiplication of three-judge panels generates more intracircuit conflicts than can be satisfactorily resolved by current *en banc* mechanisms. There is some truth in this charge. But dividing the Circuit simply transforms intracircuit conflicts into intercircuit conflicts that can be resolved, if ever, only by the United States Supreme Court. That Court does not have the decisional capacity to resolve the existing intercircuit conflicts. The creation of the new circuits, therefore, increases these conflicts with no mechanism for their resolution. The solution to intracircuit disarray and the overconsumption of judicial time in *en banc* matters is not a revision of circuit lines, but a revision of *en banc* mechanisms.¹

Our Circuit is currently operating with thirteen active judgeships,² but we have part time services from our five senior judges, visiting senior circuit judges from other circuits, and senior and active district judges. The reality is, therefore, that we are now trying to accommodate the views of about thirty judges.

¹ The revision is not simple, but it is not impossible. A number of plans have been suggested whereby a majority of the Court, but not less than nine members, would perform the *en banc* function.

² We have 12 active judges and one vacancy.

Although no one suggests that this situation is ideal, it is strong evidence that a circuit court with a judicial complement of more than three times the mystical nine can and does operate effectively.³

The second prong of the argument in support of the circuit splitting is that the judges in the new circuits will be able to increase their individual output. The increased work product is purported to flow from several sources: (1) reduction of traveltime, (2) reduction of paper work, and (3) geographical concentration of the judges of the divided court.

Some travel time is inevitable no matter how the court would be divided. Guam, Hawaii, Alaska and the Pacific Northwest are thousands of miles apart from each other and exceedingly distant from Los Angeles and San Francisco. The Commission's recommendations do not move them an inch closer to each other. Of course, we could save all of the judge's travel time if we compelled all of them to maintain their residences at the same place, and we also compelled all of the litigants to present their cases at that place. The difficulties with those notions are sufficiently evident that no one has proposed them.

The circuit division, as recommended by the Commission, save an insignificant amount of travel time. The travel saved by the San Francisco based judges no longer sitting in Los Angeles is more than offset by their necessarily increased sittings in Alaska, Hawaii, and the Pacific Northwest. The Pacific Northwest judges save an extra two hours an average of one calendar per month by sitting in San Francisco, rather than Los Angeles. The Los Angeles based judges save two travel hours plus the airport commute to San Francisco, one trip per year to the Pacific Northwest, and one trip every third year to Alaska and Hawaii. These savings are truly negligible because travel is rarely arranged during hours that would be spent in chambers and almost all, if not all of us, use the travel time reading briefs and advance sheets.

A decrease in paper work is highly unlikely unless the judges changed their present methods of working. Of course, if the judges heard fewer cases and wrote fewer opinions than they do today, everyone would have less paper work. That thought cannot be squared with increased production. If we had a smaller court, there would be a lesser number of views to be exchanged, but the volume of paper would not be significantly reduced. The records and briefs must still be read in every case. The three judges must exchange views on each panel. Unless they abandon their present practice of exchanges in writing, the paper volume will be the same for all panel opinions. (They now can and do talk to each other orally as well.) If there were fewer members of the court or different *en banc* mechanisms, some savings would be achieved on *en banc* hearings. Note, however, that any and all of these savings do *not* come from circuit realignment, but from changes in the internal operating procedures of the court.

Geographical concentration of the judges does not depend on circuit realignment. Instead, it depends on the inclinations of the individual judge to maintain his residence at the place of his own choosing.

Finally, neither logic nor intuition supports an assumption that circuit division will have any impact on the amount of work that any judge produces. My experience on several appellate courts, including this one, tells me that a judge's work product, like a lawyer's, largely depends upon his or her own capacity and personality. A slow and methodical workman does not accelerate, nor does a hard driving, quick workman slow down when he or she is exposed to different judicial geography. As far as I am aware, every judge on this Court is producing the maximum work that that judge can do. Circuit splitting will not increase anyone's maximum.

In summary, an analysis of the assumed benefits of circuit splitting reveals that they are at best minimal. However, the costs are substantial. The dollar costs of creating a new Clerk, new Circuit Executive, and new offices for the Clerk are obvious. Of much greater moment, however, are the less visible costs to the federal judicial system as a whole. The critical item on this list is the

³ An active and senior in-circuit judge complement of 30 judges would be far easier to manage because all of them would have the continuing responsibility for maintaining the institutional unity of our court, and they would not be distracted by the duties of their own separate courts to which their primary allegiance is owed. (In making this point, I do not suggest that 30 judgeships are needed for our Circuit.)

inevitable increase in intercircuit disharmony.⁴ Although added intercircuit conflicts cannot be readily qualified, they will occur and they will swell the Supreme Court's certiorari overburden. The inability of the Court to hear more than a few of these cases will further Balkanize federal law and will generate more litigation.

Circuit splitting makes bad problems worse without solving anything. If the circuit is nevertheless going to be divided, the division should be made without cutting California in two.⁵ The severe difficulties engendered by splitting California between two circuits have been cogently stated by the State Bar of California and by the Special Committee of the Bar Association of San Francisco.⁶ I adopt their reasoning opposing the division of California.

None of the proposals for a division is satisfactory. The least unsatisfactory division, in my view, is a new Ninth Circuit composed of California, Arizona, Hawaii, and Guam, and a new Twelfth Circuit composed of Alaska, Washington, Oregon, Idaho, Montana, and Nevada. This division leaves about three-quarters of the caseload in the Ninth Circuit. Hawaii and Guam together account for a miniscule portion of the burden; Arizona has a significant volume of business, but the depth and duration of her economic and legal ties to California makes impracticable her annexation to the Tenth or Twelfth Circuit. This split substantially reduces the geographic reach of the present Ninth Circuit, but it relieves the Circuit of no more than a quarter of the caseload. A heavy caseload is unavoidable if California remains whole because it supplies almost two-thirds of the litigation.

Serutiny of this division and any other suggested plan again raises the pivotal question: In view of the serious problems engendered by division, is any truly useful purpose served by drawing new lines on the map of the Ninth Circuit?

[Whereupon, at 2:45 p.m., the subcommittee adjourned, subject to the call of the Chair.]

⁴ Proponents of circuit splitting have implied that this increase is not a concomitant of division. They would be on sound ground if a majority of the judges in both new circuits shared a common legal and social philosophy, but they do not. The judges of this Circuit do not have homogenized views. Their opinions are going to differ sharply no matter how the Circuit would be divided. The sharp differences of views that characterize our *en banc* hearings, in my view, will inevitably carry across new circuit lines. We have no reason to believe that new judges will be any the less individualistic than the present ones.

⁵ Slicing California in twain is essential if Congress is determined to adhere to the mystique of nine or almost nine judges per circuit. A court of less than nine cannot handle the California load. Indeed, nine judges would be hard pressed to undertake the burden at its present level.

⁶ "Statement of the State Bar of California Opposing the Proposal to Divide the State of California into Two Federal Judicial Circuits, as Proposed by the Commission on Revision of the Federal Court Appellate System" (May 1974). "Report of the Special Committee of the Bar Association of San Francisco to Review Report of the Commission on Revision of the Federal Court Appellate System" (July 1974).

APPENDIX "A"

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PREPARED STATEMENT OF JOHN R. BROWN,
CHIEF JUDGE
U.S. COURT OF APPEALS
FIFTH CIRCUIT
HOUSTON, TEXAS

[Submitted to the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, in Hearings held on May 9, 1972 on the Revision of the Appellate Court System (S.J. Res. 122, 92d Cong., 2d Sess.).]

STRUCTURE OF THIS STATEMENT

This statement is structured in two main divisions:

Part One: This covers comments, views, recommendations, and suggestions on S.J. Res. 122 on the Commission for Realigning Circuits (and related legislative proposals).

Part Two: As requested by the Chairman (letter March 17, 1972) this covers comments, recommendations and data in support of the Judicial Conference approved request for substantive legislation providing for Legal Assistants to the Fifth Circuit.

SOURCE AND RELIABILITY OF STATISTICS

Except where specific identification is made to tables, etc. in the Administrative Office reports (e.g., AO Table 6) or to the Shafroth Report, all of the statistics are those kept by the Fifth Circuit. Except for updating them in terms of actual input and output, and revising projected future estimates in the light of intervening actual experience, these Fifth Circuit statistics are essentially those submitted formally to the Chief Justice (and later to the Federal Judi-

cial Center) in connection with the "Fifth Circuit Crisis Project". Before submission to the Chief Justice and the Judicial Center these statistics were submitted to the Administrative Office and found to be reliable and acceptable (we were informed a few inconsequential arithmetical errors were found). The most significant thing is that the Fifth Circuit figures are *hard figures*. Unlike the statistical reporting standards followed by some of the Courts of Appeals and the input AO tables, we have eliminated entirely cross-appeals and multiple appellants. (See e.g., AO Table 4—1971 report, page II-9 and Table B 1, page A 2, total filings FY '71 2,316 as compared with actual filings Fifth Circuit figures 2,077). Our projections for FY '73-'75 (as was true with the Shafroth surveys) are based on these actual hard figures.

Supporting detail for the statistics emphasized herein can be found in our Clerk's Annual Report (Clk. Ann. Rept.), his report "Miscellaneous Statistics on Standing Panels, Screening, Caseload, Workload, etc. for FY 1972," October 19, 1971, which will be furnished to the committee if desired.

Part One

EXPERIENCE OF THE FIFTH CIRCUIT WITH PROBLEMS OF COURTS OF APPEALS

As you know, I am John R. Brown of Houston, Texas. I have been on the Fifth Circuit Court of Appeals since September of 1955. I am Chief Judge and have been since July 17, 1967. But as I previously stated to various Committees of the Congress, before becoming Chief Judge I had a great deal of experience in Court administration because of the work delegated to me by my predecessors Chief Judges Hutcheson, Rives and Tuttle. As all know, the Fifth Circuit with fifteen authorized active Judges is the largest constitutional Court in the United States. It is largest also in terms of population of its constituent states (Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas), in the number of cases filed, the number of cases disposed of, and the number of opinions published. Consequently, the Circuit has every kind of problem in double measure that Federal Appellate Courts could have. But the Court has not allowed these staggering burdens to overwhelm it. Through the diligent, resourceful, imaginative efforts of conscientious Judges—who know no limitations on energy—we have adopted innovative systems that have increased our output enabling us so far to keep abreast of this load. But even with these new practices we have to recognize with the Court at its present size (fifteen active and three energetic Senior Judges) that something has to happen now, and certainly long before FY 1975.

This sense of great urgency was sounded by the Judicial Council to the Judicial Conference of the United States, in the formal resolution of October 1971 (App. A). The Judicial Conference by formal action took note of this and the necessity of transmitting this urgency to the Congress.

FIFTEEN JUDGESHIP MAXIMUM

Although there are some internal differences, the Judicial Council of the Fifth Circuit after careful consideration concluded unanimously that the Court should have not more than fifteen active Judges.

Inevitably, this means that on current exponential projections for FY 1972-1980 somehow the Circuit has to be split.

FIFTH CIRCUIT COMMITTED TO NATIONWIDE CIRCUIT REALIGNMENT

The Council by formal resolution in October 1971 endorsed without reservation the principle of national Circuit realignment "as an indispensable first step toward improvement in the federal circuit court system". See the Resolution App. A.

The Judicial Conference of the United States, in its October 1971 meeting in its report on "Additional Circuit Judgeships" (see p. 81, 82, Report of the Proceedings of the Judicial Conference of the United States, October 28-29, 1971), in which ten additional Circuit judgeships were recommended, took note of the situation in the Fifth Circuit and the recommendation of the Judicial Council concerning nationwide circuit realignment:

In making this recommendation the Conference noted that based on statistics alone seven additional judgeships would be warranted in the Fifth Circuit over and above the 15 now authorized and five additional judgeships would be warranted in the Ninth Circuit rather than the two recommended. The Conference agreed further with its Committee on Court Administration that to increase the number of judges in a circuit beyond 15 would create an unworkable situation. In this connection the Conference noted a resolution unanimously adopted by the judges of the Fifth Circuit in October 1971 in which the judges state that the Judicial Council "holds strongly to its prior formal determination that to increase the number of judges beyond 15 would diminish the quality of justice in this circuit and the effectiveness of this court to function as an institutionalized federal appellate court." The Judicial Council of the Fifth Circuit went on to endorse H.R. 7378, a bill to establish a Commission on the Revision of the Judicial Circuits as previously proposed by the Judicial Conference "as an indispensable first step toward improvement in the federal circuit court system."

NEED FOR THE COMMISSION

Although, as originally conceived by the Judicial Conference, the Commission's recommendation, at least with regard to geographical circuit lines, was to be self-executing unless expressly disapproved by the Congress within the stated time prescribed in S.J. Res. 122 (or in the revision of HR 7378 reported out March 7, 1972 by the House Judiciary Committee), I unhesitatingly endorse S.J. Res. 122. The important thing now is that there be a national circuit realignment and the Commission concept seems to be the one most likely to succeed if relief is to be obtained before conditions become simply impossible. I am confident that this is the sentiment of the Judicial Council of the Fifth Circuit.

STRONG POINTS OF S.J. RES. 122

In my judgment, the strength of S.J. Res. 122 is in the broad "commission" given to the Commission. Unlike some earlier versions in which the commission's work, findings, and recommendations were largely geared to drawing geographical lines for the recommended revised or new Circuits, this Resolution charges the Commission to make comprehensive penetrating studies. The problems of the Courts of Appeals, the possible solutions, and the nature and character of the decisive decisions which have to be made for any long range solution are capsulated in §§ 1(a)-(f) describing the function of the Commission to be:

(a) to study the present division of the United States into the several judicial circuits;

(b) to study the problems attendant upon prehearing screening of appeals, en banc hearings, intracircuit and intercircuit disparity in interpretation of Federal law, and other appellate procedures and problems;

(c) to study the present and anticipated caseloads of these circuits, the workloads of the judges, the time required for appellate review, and the alleviation of the problems arising therefrom by redividing the United States into several judicial circuits or by restructuring the appellate court system, or by other feasible court reforms;

(d) to study the problems arising from present and anticipated caseload of the Supreme Court and the possible alleviation of these problems;

(e) to study other areas of court reform related to the problems specified herein; and

(f) to recommend to the President, the Chief Justice of the United States, and the Congress such alternative changes in the appellate court system of the United States as may be most appropriate for the expeditious and effective disposition of the present and anticipated caseload of Federal appellate courts, consistent with fundamental concepts of fairness and due process.

CIRCUIT LINE DRAWING ALONE IS SUPERFICIAL

If we are to find really permanent solutions—instead of stop gaps that will be outdated within five years—it is important, in my judgment, that these broad and specific mandates be retained. A bill which merely charges the Commission to recommend new geographic Circuit lines is no solution at all.

More important, the lines can hardly be drawn as an effective solution for the short range future (10–20 years) without the consideration of several decisive factors. First, no rearrangement or realignment of the Circuits can avoid the need for judgepower, since the needed judgepower depends on the business, not artificial state or Circuit lines. Second, lines cannot be drawn that will adequately care for the short range future without careful analysis of the role of the intermediate Courts of Appeals in the federal system. In the light of frightening projections, this must reckon with such problems as (i) the appeal as a matter of right in every civil and criminal case no matter how meritorious and (ii) the reduction in diversity and other jurisdiction and the like. Once the role or mission of the intermediate appellate federal court system is determined, the Circuit lines cannot intelligently be drawn apart from some understanding of just what it is Circuit Judges, singly and collectively as a Court, can reasonably be expected to perform. This brings into the inquiry the extent to which the problem is too much the product of traditional practices and, on the other hand, the extent to which much can be alleviated and often overcome by imaginative innovations. This borders on the earlier problem of the role of the Court of Appeals and the extent to which we can continue the luxury of the traditional oral argument in nearly every case.

Based to a great extent on the vast experience of the Fifth Circuit, I undertake in the following to demonstrate in more detail the basis for these concerns.

BUSINESS—NOT CIRCUIT LINES—DETERMINES JUDGESHIPS

The superficiality of Circuit line-drawing as a solution is illustrated by the predicament of the Fifth Circuit. Based upon experience-proved projections, the work ahead for the Fifth Circuit on an annual basis FY 1971–75 with a forecast for 1980 is as follows:

TABLE 1.—PROJECTION OF FILINGS FISCAL YEAR 1972–75 PER SHAFROTH 1970 SURVEY AND FIFTH CIRCUIT REVISION

Fiscal year	1970 Shafroth Survey ¹	September 1971 upward revision Fifth Circuit ²	Upward revision percentage increase
1971.....	1,852	³ 2,077	² 15.8
1972.....	2,006	2,596	² 25.0
1973.....	2,159	2,794	² 7.6
1974.....	2,311	2,990	² 7.0
1975.....	2,464	3,188	² 6.6
Cumulative increase, fiscal year 1971–75.....			53.5
1981 ⁴		6,750	⁶ 38,875

¹ The first survey was in 1967, Survey of U.S. Courts of Appeals, 1967, 42 FRD 243 et seq. Within a year the projections through 1975 had to be revised and within just two more years, the 1970 survey again revises them substantially upward.

² Upward revision of Shafroth based on projected 29.4 percent estimated deficiency in Shafroth's projection for fiscal year 1972. Cross appeals and multiple parties eliminated. The forecasts for fiscal year 1972–75 are undoubtedly on the low side since the annual increase for each of these years is calculated on the deficiency of Shafroth projections for fiscal year 1971 (12.1 percent). The Court's actual experience showed yearly gains—1968–71 of 13.2, 10.6, 20.5 and 15.8 percent respectively. These average out to approximately 15.0 percent.

³ Actual filings.

⁴ Fiscal year 1981 projections based on 225 percent increase (267 percent with cross appeals) in 5th Circuit fiscal year 1961–71 and 204 percent national increase as reflected by table 2 A.O. 1971 report (cross appeals and multiple parties excluded).

⁵ National (all circuits).

Incidentally, demonstrating the exponential increases in filings the above table was markedly revised upward over our January 1971 projection. On the basis of the first three quarters of FY 1972 the projections for FY 1972 still hold true as do those for FY 1973–1975.

Thus, for example, on the September 1971 projections in FY 1972 we will have 2,304 cases (revised in Table 1). If the six states (see map) were divided

3 and 3, 8 of the Judges would end up with 144 filings per Judge and the other 7 with 164 per Judge.¹ This is in contrast to the national average of FY 1970 of 120 cases per Judge.² And in FY 1974 with 2,655 filings the division would be 166 and 189 cases per Judge.

TABLE 2.—STATISTICS COMMITTEE JUDGESHIP PROJECTIONS

Circuit	Present number	New judgeships statistically justified per circuit	New total
First.....	3	1	4
Second.....	9	5	14
Third.....	9	1	10
Fourth.....	7	1	8
Fifth.....	15	7	22
Sixth.....	9	1	10
Seventh.....	8	1	9
Eighth.....	8	0	8
Ninth.....	13	5	18
Tenth.....	7	1	8
Total.....	82	23	111

As the detailed charts show, on eight different statistical projections the Fifth Circuit's needs average 8 and run from a low of 5 to a high of 10 more judgeships.

As pointed out above (page 6) the Fifth Circuit declined to ask for any judgeships in excess of 15.

Now would a series of splits within the Fifth Circuit be of any real help. The problem is posed, of course, because of the East and West anchor states, Florida and Texas, which have 53.7% of our business plus the adjacent states of Georgia and Louisiana making up another 30.4%.³ Based on FY 1970 figures combining Florida (443) with its 3 Judges and Georgia (264) with its 2 Judges for a total of 707 case filings and 5 Judges to produce a caseload of 140 would help none. On the other end, combining Texas (492) with its 4 Judges and Louisiana (264) with its 2 Judges for a total of 756 and 6 Judges would momentarily reduce the caseload only slightly.

TABLE 3.—ORIGIN OF FILINGS BY STATE

State	1967-68	1968-69	1969-70	1970-71	Percent increase fiscal year 1971 over 1968
Texas.....	354	412	492	596	68.3
Florida.....	343	390	443	502	46.3
Georgia.....	215	194	264	316	46.9
Louisiana.....	165	213	264	300	81.8
Alabama.....	139	128	162	181	30.2
Mississippi.....	82	111	114	135	64.6
Overall.....					55.6

¹ Recognizing the sometime unreliability of case filings per judgeship these illustrative projections for FY 1973 and 1974 are more than borne out by the recommendations of the Subcommittee on Judicial Statistics of the Court Administration Committee of the Judicial Conference. See page 4 of Judge Dunaway's report of March 19, 1971 and the table, page 2 of the A.O.'s Statistical Study "Judgeship Needs in the United States Court of Appeals" February 1971 in which seven additional judgeships are recommended for the Fifth Circuit between now and FY 1975.

² See the very recent well constructed Administrative Office "Management Statistics" February 1972. With no downward adjustments to eliminate multiple parties and cross-appeals, the Fifth Circuit filings for FY 1971 were 154 in contrast to national average of 132.

Since our projections (Table 1) exclude these, the figure of 120 must be correspondingly reduced.

³ The origin of the Fifth Circuit business is shown by the filings by states for the last three years.

The problem is readily seen from the map of the present Circuit lines using the figures of FY 1971 as a matter of convenience:

See 28 U.S.C.A. § 41



But that is not all. For on the projections (see Table 1) there is a marked increase each year over the preceding year in percentage and the resulting case filing per fifteen active judgeships.

INCREASED WORKLOAD PER JUDGE

Based on the September 1971 upward revisions, the impact per active Judge (15 in number) will be:

TABLE 4.—PROJECTED FILINGS AND CASELOAD INCREASE

Fiscal year	Annual percentage increase	Caseload per judge
1971.....	15.8	138
1972.....	25.0	173
1973.....	7.6	186
1974.....	7.0	199
1975.....	6.6	212
Cumulative 1975 over 1971.....	53.5	

These caseload increases from 173 this year (FY 1972) to 212 in FY 1975 wipe out any possible gains by conceivable practical adhesions.

This analysis shows that drawing Circuit lines is not a solution at all. No matter how drawn, no matter how we are paired or aggregated, no matter what adhesions are made to existing or newly created Circuits, the judicial business in the states now comprising the Fifth Circuit is and will be such that the existing judgepower cannot possibly handle it. We must therefore find some other solutions.

IS SOLUTION IN A 9-JUDGE COURT? IS THERE MAGIC IN THE NUMBER 9?

One quick simple solution is, of course, to forecast the growth in judicial business against the estimated acceptable output per judgeship and then aggregate contiguous states to form a Court having not more than 9 Judges. This would be on the assumption that there is validity to the oft repeated statement that a Court of more than 9 Judges cannot work efficiently.

Among my own colleagues on the Fifth Circuit there are some that feel this way. Despite the added problems from size, experience of the Fifth Circuit demonstrates that we are and have been a Court of remarkable productivity. We are now officially a Court of fifteen active Judges, but we have long been a Court exceeding 9 judgeships. Beginning with the very capable leadership of our then Chief Judge Elbert P. Tuttle, we followed the practice of using visiting Judges—both District and out-of-Circuit Judges plus our own energetic Senior Circuit Judges. This produced a Court of equivalent judgeships as follows:

TABLE 5.—EQUIVALENT JUDGESHIPS FROM VISITING JUDGES

Fiscal year	Total court weeks	Available active 5th Circuit judges	Judge weeks from visiting judges	Equivalent judgeships
1965.....	30	7	25	10
1966.....	39	9	33	13
1967.....	45	12	33	16
1968.....	48	13	35	17
1969.....	46	12	50	19

If there ever was a case in which the pudding's proof is in the eating, then our output demonstrates that we did make it work and work effectively. Later I discuss this further in connection with the development of output standards of productivity by new procedures and innovations. It is sufficient there to say that in every year since 1966 the output has exceeded the total input for the previous year, and in the short course of the last three years active Judges have increased their opinion output by 75.4% and the Court as a whole increased by 74.3%.

Of course, I do not minimize the problems, including the burden that rests upon each of the Judges not only in case participation and opinion-writing but in keeping abreast of the flood of opinions that the Court is handing down (over 1,661 FY 1971). All would like a Court of 9 as an ideal size. But the simple fact is that for the federal system this is a goal that can hardly be attained. And if it is attained there will be such a proliferation of Circuits that

an even more impossible burden will be placed upon the Supreme Court of the United States in its very important role of "policing" the cases of great importance coming from the Circuits.

More important, even in using the 1970 revised Shafroth projections (which are already on the low side), it is certain that by FY 1975 at least 5 of the Circuits will require judgeships in excess of 9. (See App. C). This schedule measures output in terms of average caseload per judgeship which at the time the table was prepared (1970) was approximately 96. On that basis a nine-man Court would handle 864 cases. The projections for added Judges needed in FY 1972 over 1970 is shown in column (e). For FY 1975 the projections are in columns (f) through (j). As shown in column (j) there will then be five Circuits requiring more than 9 Judges: Second, fourth, fifth, seventh, and ninth.

While the total new judgeships forecast in the statistical study by the Conference Committee is 23, rather than 42 as in my table for FY 1975, it is interesting to see that this much more elaborate analysis on variable factors covers several of the same Circuits (see Table 2):

TABLE 6.—*Recommendation excess of nine judges statistics committee*

Circuit:	Required total judgeships 1975
Second.....	14
Third.....	10
Fifth.....	22
Sixth.....	10
Ninth.....	18
Total.....	74

With 74 judgeships needed for these 5 Courts, this means that restructuring down to 9 judgeships per Court would call for at least 3 new Circuits to bring the total up to 14. With 13,801 cases predicted for FY 1975 for all Circuits in Shafroth (1970 Rev.), and the FY 1980 projection for all Circuits of 34,881 cases (see Table 1), this means that unless there is a radical revision in the role of the Courts of Appeals within the short five-year period from 1975-80 the 120 recommended judgeships (see Table 2) will have to increase to 320. Applying the ideal goal of a nine-man Court we would have 35 Circuits. The prospect of 35 Courts of Appeals in terms of the capacity of the Supreme Court effectively to give consistency to the body of controlling federal law is staggering. Worse, the staggering burden is augmented by the fact that the great majority of such new Courts would be Federal Courts of Appeals for a single state with all of the parochialism that would bring. The federalizing influence, so essential to the political and social structure of the United States, would be severely undermined.

Of course, I am not arguing here that Courts should expand to the sizes indicated even in 1975 (see App. C) and the statistical studies of the Administrative Office (see Table 2). We will reach a working limit. Rather the importance of this is to demonstrate again that it is the judicial business flowing into the judicial system which determines the need, not the geographical or the momentary arrangement of those judgeships in one or the other Circuit.

It is positive proof that those who are charged with the responsibility of recommending Circuit lines must not approach it on any supposed idyllic nine-man Court. That means, therefore in the most direct way, this Commission ought to try to ascertain what is the maximum size of a Court of Appeals that is manageable. It has a rich reservoir of material in the Ninth Circuit and the Fifth Circuit on which to make objective judgments. And once the effective use of visiting Judges, as employed in the Second Circuit, is analyzed in terms of the real total judgepower of such Court for a given year, further helpful data will result. Perhaps more important, this quest for the magic nine compels us to recognize that we must stop, look and listen to determine how long we can go on with the Courts of Appeals having their present role.

THE ORIGIN OF THE BUSINESS

Up to now—including the very penetrating Statistical Study made by the Conference Committee on Judicial Statistics (see Table 2)—projections for

judgeship needs for Courts of Appeals are always in terms of the business of those Courts. Every projection is based upon the input. Never has there been any inquiry in terms of the real source of the input—the District Courts from which the great bulk of appeals come. As the 1971 Report of the Director pointed out “the United States District Courts must go on struggling with mounting work. Filings are at a new high: so are terminations. But number of terminations for the most part has not kept up with filings so, inevitably, the record for fiscal year 1971 will also show a new high of pending cases. The 124,525 civil and criminal cases pending on June 30, 1971 is nine percent higher than a year ago and almost 81 percent above the 1960 level.

With continuing increase in population and general business, the Fifth Circuit has to reckon with the fact that its six states, comprising 12% of the states, in FY 1971 produced 21,657 of the civil cases filed or 23.2% out of the Nation's total of 93,396 and 10,727 criminal cases of 24.9% out of the Nation's total of 43,157 (see Table C 1 and D 1, 1971 A.O. Rep.). The growth in judicial business within the states of the Fifth Circuit is reflected by the recent addition of 16 district judgeships under the last omnibus District Judgeship Bill.

Undoubtedly the Commission would—and under the structure of the Bill as presently drafted could—investigate and analyze carefully this origin of business factor. But once again, any such study and the projections which are bound to come from it—especially in the light of current experience in the disproportionate increase in the number of appeals—brings the Commission back again to the basic question of the role which should be committed to the Federal intermediate courts of appeals. That could manifest itself in many ways, two of which are discussed in greater detail—(i) reducing federal jurisdiction in certain areas (ii) abandoning appeal as a matter of right with discretionary certiorari-type review in a significant number and type of cases.

DISPROPORTIONATE INCREASE IN APPEALS TO TRIALS

One of the significant factors bearing directly upon the exponential increase in caseloads of the Courts of Appeals is the disproportionate increase in the number of appeals over the increase in the number of trials, both civil and criminal, in the District Courts.

This was analyzed in the Shafroth (1970 Rev. Report), and for the Fifth Circuit is shown on App. D. As reflected, in FY 1961–1969 civil trials increased 94.7%, but at the same time civil appeals increased 157.1%. More startling, however, is that of criminal cases. Somewhat surprisingly, criminal trials increased but 48.1%, but criminal appeals jumped an amazing 210.6%, and against an appeal in approximately 1 out of every 6 criminal cases in FY 1961, in FY 1968 and 1969 every third case was appealed. Undoubtedly much of this is due to the Criminal Justice Act which, with its essential and commendable objective of affording counsel to all defendants, encourages appeals some of which have little merit. But there is no indication that this will subside and from the standpoint of the professional interest of court-appointed counsel, it is increasingly evident that the appeals are taken to eliminate the possibility that in a post-conviction remedy the defendant would accuse his counsel of inadequate representation for failure to take the appeal. Of course, this tendency, already quite evident in post-conviction cases, will likewise increase now that under Amendments to the Criminal Justice Act court-appointed counsel in both the Trial and Appellate Court on a selective basis can be given limited compensation.

Once again this brings the focus back to whether a system can be tolerated which continually increases the percentage of appeals over trials.

REDUCTION OF CASELOAD STATUTORY CHANGES

If the Commission were statutorily charged with the duty of analyzing the role of the intermediate federal appellate courts in the light of factors including those I have discussed, it is inescapable that it would be faced with the necessity of determining what sort of statutory changes could and ought to be made. This would take two main forms. The first is the reduction in federal jurisdiction in terms of the District Courts. Perhaps most significant as current illustrations of that approach on diversity jurisdiction and two American Law Institute suggestions which commend themselves, (a) denying a citizen of

the state in which the District Court is held the right to invoke diversity jurisdiction in that district, and (b) treating a foreign corporation with a permanent establishment in a state the same as a local citizen, thus denying it the right to invoke diversity jurisdiction, either originally or on removal.

Certainly this explosive growth in federal court litigation calls for a critical examination of the place for diversity jurisdiction and the limitations to be placed on its exercise. There are undoubtedly a number of other areas representing a substantial portion of a District Court's docket which should be scrutinized carefully. One must recognize, of course, that against the hope that some jurisdiction would be reduced, it is a certainty with the continuing enactment of more and more federal regulatory legislation that the federal question jurisdiction inescapably will increase markedly.

The other principal form of statutory change would be with respect to the jurisdiction and function of the Court of Appeals. Now except for a rare bankruptcy case, a criminal case which the Court under stringent standards declares to be frivolous, and habeas cases in which certificate of probable cause is denied, the statutory structure of the United States Courts of Appeals is to afford an appeal as a matter of right in every case. That policy must be seriously questioned now in the face of the projections for FY 1975 and 1980. Probably the most useful thing would be to establish a discretionary review of a certiorari-type in significant types of cases. This may take many different forms. The diversity cases once again afford a ready example. To the diversity cases should also be added post-conviction cases under habeas corpus or §2255 or the like. Others might include review of social security cases—almost invariably presenting nothing but a factual controversy which has already been through a review by the District Court. Much the same could be said about cases from the National Labor Relations Board, especially that great bulk of them presenting nothing but a factual controversy with no significant legal principles presented.

No Commission can realistically draw Circuit lines against the prospect of FY 1975–1980 caseloads without seriously questioning whether any such system can be tolerated, or for that matter even survive. Unless another tier of an intermediate appellate court is to be created, serious concern must be given to those areas in which the work of the Court of Appeals would be reduced by restricting its role in a number of significant areas or types of cases. Any such ultimate decision would be fraught with a good deal of controversy. The Commission, composed of distinguished people from all walks of life, with its wide resources and inquiry from all elements of the community, including the organized Bar and individual or groups of lawyers with partisan views, could undoubtedly come forward with well-founded conclusions and recommendations which would be of great assistance to the Congress in the process of enacting some or all of the recommended legislative changes.

WHAT SHOULD APPELLATE JUDGES DO? WHAT CAN APPELLATE JUDGES DO? WHAT SHOULD A COURT OF APPEALS DO?

Finally, in drawing Circuit lines, there has to be some sort of qualitative standard by which the Commission determines just what reasonably can be expected of a single Circuit Court. Inevitably this means examining into what Judges can and ought to do. Of course, this involves many subjective factors which are beyond measure and would be fruitless to examine. But there is sufficient experience now in a number of Appellate Courts, state and federal, by which the size and location and the geographical area of a proposed Circuit would be determined in a significant degree by the extent to which the use of new and unusual procedures would significantly increase output. These present matters can be measured on an objective basis. They also bear directly on the underlying question of the basic role or mission of the appellate court, or, perhaps more accurately, just what kind and character of an appeal can we now tolerate for just the 10 years (to 1980) ahead in the face of this explosive expansion. First, to pinpoint one or two things. Is an appeal of right too much of an ideal? Where do we cut it off? How is it cut off? By express exclusion from appellate jurisdiction? Or by a discretionary review? If appealable, is it either necessary, wise or desirable to structure it on the supposition that oral argument is available in every case? To what extent should oral argument hearings be reduced or eliminated? What safeguards are necessary to assure serious review of appeals authorized by statute if handled summarily without

oral argument? To what extent can Courts improve productive output by the use of standing panels? What safeguards are needed? How much rotation of panels and constituent Judges is necessary or desirable?

It seems to me that unless the Commission is simply going to confine itself to demographic data and that coming from the source of business (the District Courts), it cannot possibly set up a reasonably ideal Circuit geographic structure without it having some notion of what Judges can and ought to be able to do. Surely the inquiry leading to Circuit lines ought to start on the assumption that much has to change. And certainly it has to change in the appellate system.

OUTPUT CAPACITY REQUIRES ASSESSMENT OF NEW METHODS

Our own experience in the Fifth Circuit has made us conscious of how important *methods* are. Had we not adopted new and untried practices, we would have long ago collapsed, and instead of a Court that is virtually up-to-date, we would have had a backlog of scandalous proportions. But as our new practices pose many of the queries briefly listed above, there is certainly a place for a study in depth by the Commission on the extent to which these and other practices are significant in affecting the productive output and are worthy of nationwide use or adaption.

Our own experience in the Fifth Circuit shows why this is vital. Our case filings started to climb from 876 in 1962 to 1,347 in 1967. One of our principal weapons in keeping abreast of this increase was the use of visiting Judges and an increase in the number of courtweeks shown below:

TABLE 7.—FIFTH CIRCUIT COMPARISON VISITING JUDGES 1965-1971

	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71	
Visiting judges.....		33	21	27	41	1	11
Court weeks.....		38	45	48	46	38	43

In the fall of 1968 with the prospect (later made good) of 1,489 filings that year, we recognized that we could not possibly keep abreast of this inflow unless we found some new ways. We knew we could not get enough visiting Judges. For that input (after proved reductions for cases terminated without significant judicial activity) we would have required 64 courtweeks. With but 12 active Judges this would have required (after full use of the three Senior Judges) 60 visiting Judges. We know we could not possibly obtain this number, and our experience with the use of 45 (in 1966-67) proved that it was impossible to effectively assimilate that many visiting Judges. This led us to adopt the Fifth Circuit screening procedure. This is explained fully in *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York*, 5 Cir., 1970, 431 F.2d 409, Part I, and the cited *Huth* and *Murphy* earlier opinions. By an elaborate, but still very simple system, we set up a program under which every case was judicially screened by Judges, not Law Clerks. The Court was divided into standing panels with cases assigned in strict routine rotation by the Clerk to the initiating Judges on each panel. We established four classes of cases. Class I covers cases so lacking in merit as to be frivolous and subject to dismissal or affirmance without more. Class II comprises cases in which oral argument is not required and which then go on the Summary Calendar for disposition on briefs and records without oral argument. For that classification we had a double unanimity rule requiring unanimity by the standing panel on classification and also on the final opinion. This leaves those cases in which oral argument is deemed required or helpful, Class III group covering those in which limited (15 minutes) argument is thought adequate, and Class IV covering those meriting up to the full time (30 minutes) allowed by FRAP 34. The success of this is little short of miraculous. For a better understanding of the operation and impact of screening, it is helpful to have the composition of our docket in the three principal categories (direct criminal, habeas—Section 2255, civil) as follows:

TABLE 8.—*Fiscal year 1971 appeals docketed by major subdivisions*

	Percent
Direct criminal.....	22.1
Habeas.....	16.0
Section 2255.....	5.1
Subtotal.....	21.1
Total.....	43.2
Civil.....	56.8
Total.....	100.0

COURTS INCREASED OUTPUT DUE TO NEW PROCEDURES—JUDICIAL SCREENING AND
DISPOSITION WITHOUT ORAL ARGUMENT

Without a doubt it is the Court's screening procedure and the large percentage of Summary II's (cases without oral argument) that has enabled it constantly to increase its output both in terminations and in opinions by Judges.

As the Court and the Judges gained experience in this new and untried procedure there was an increase in the number of Summary II's and, so important, a *decrease* in the number of cases for oral argument as shown below:

TABLE 9.—SCREENING CLASSIFICATION BREAKDOWN TO NUMBERS AND PERCENTAGES

Class	Fiscal year 1969		Fiscal year 1970		Fiscal year 1971	
	Number	Percent	Number	Percent	Number	Percent
I and II.....	218	32.7	452	38.1	62	4.7
III.....	265	39.7	506	42.7	511	46.3
IV.....	184	27.6	229	19.2	154	10.8
Total.....	667	100.0	1,187	100.0	1,428	100.0

Although FY 1971 II's were 45.7% for the whole year, it is significant that there was a substantial increase in the last half (to 51.6%) over the first half of FY 1971.

TABLE 10.—SCREENING REPORT, JULY 1, 1970 THROUGH JUNE 30, 1971

	July 1, 1970– December 29, 1970		December 30, 1970– June 30, 1971		Overall	
	Number	Percent	Number	Percent	Number	Percent
Class I and II.....	306	40.4	346	51.6	652	45.7
Class III.....	356	47.0	266	39.6	622	43.5
Class IV.....	95	12.6	59	8.8	154	10.8
Total.....	757	100.0	671	100.0	1,428	100.0

Although under an experimental Standing Panel project (which the Court had to abandon because of adverse, substantive side effects, especially a lack of adequate personnel) the Summary II's for a short period (July–September 1971) reached 69.7%, the overall percentage has now settled down to about 55%.

That Summary II's run the gamut of the Court's whole docket and do not in any sense—as too often supposed by some Judges, scholars and critics who are uninformed—represent so-called "trash" or frivolous, worthless, wasteful cases is shown by the following subject matter breakdown for FY 1971.

TABLE 11.—CLASSIFICATION AND SUBJECT MATTER OF CASES SCREENED JULY 1, 1970 TO JUNE 30, 1971

Subject matter	Class I	Class II	Class III	Class IV	Total
Direct criminal	2	177	138	28	345
Habeas corpus:					
With counsel		39	43	4	86
Without counsel		128	10		138
Section 2255:					
With counsel		21	7	1	29
Without counsel	1	42	3		46
Civil:					
Private civil		126	222	75	423
U.S. civil		40	56	14	110
Tax		17	53	10	80
Bankruptcy		7	13	2	22
NLRB		20	24	6	50
Other agency		4	7	2	13
Civil rights	1	21	42	10	74
Admiralty		6	4	2	12
Total	4	648	622	154	1,428

Of extraordinary significance is what screening and Summary II's produce in the field of direct criminal appeals and post-conviction remedies (habeas and §2255). Delay in total time from conviction to final affirmance and termination of post-conviction remedies is a matter of great public concern, if not a near scandal. Experience has demonstrated that the use of Summary II's sharply reduces this time since this eliminates all calendaring delay:

TABLE 12.—FISCAL YEAR 1971 PERCENTAGE OF SUMMARY II's TO TOTAL CRIMINAL-RELATED CASES

	Summary II	Total	Percent of summary II to total cases
Criminal	179	345	51.8
Section 2255	64	75	85.3
Habeas	167	224	74.6

This means that out of this whole criminal area which comprises 41.5% of our docket in FY 1972 (see App. F attached) a good portion goes off without oral argument. Of direct criminal appeals (comprising 20.7% of the docket in FY 1972) 51.8% of those go off as Summary II's. It is even higher for habeas (74.6%) and 2255's (85.3%) which jointly comprise 20.8% of our docket.

This is of particular significance in relation to the time it takes as we discuss later under expediting criminal appeals and the median time study.

Another significant result of Summary II's in direct criminal appeals is to markedly reduce the median time from the date of filing of the record until date of final disposition in the Court of Appeals. In the study leading to the formal Plan for Expediting Criminal Appeals adopted by the Fifth Circuit Judicial Council in January 1972 (copies of which are being furnished to the Committee) a median time study showed that in cases disposed of after oral argument, the median time was 12 months. In contrast, for those disposed of as Summary II's without oral argument, the median time was 8 months. With tightened procedures concerning the preparation and filing of the record in the trial court, shortening briefing schedules in the Court of Appeals, and eliminating all causes for delay in filing briefs in the Court of Appeals, Summary II's will be even more significant. The case goes to the screening panel immediately on the filing of the last brief thus eliminating all delay for routine calendaring, the time between the issuance of the calendar and the date set for argument, etc.

THE FIFTH CIRCUIT INNOVATES AGAIN—RULE 21

As though screening were not enough, experience of about two years with the system revealed that in this great volume of appeals—many of which were

on the oral argument calendar as III's and IV's—judicial consideration of them by the panel, either on the summary or regular calendar, demonstrated that no good would be served by an opinion. Consequently, on August 14, 1970, the Court adopted what it calls Rule 21 which permits a simple order of affirmance for civil and criminal cases (not reversal) and enforcement in an administrative agency case. This rule, in its operation and the necessity for it, is detailed in *NLRB vs. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

Of course, such a device must be, and is, carefully used. Scattered as we are geographically, it works well for us. At least in effect it closely parallels the practice frequently used in the second Circuit of dismissal from the Bench. In reaching our output of 1,661 opinions this has been significant since Rule 21 opinions comprised 23% of the total per curiams for FY 1971. In contrast and to illustrate the progress and effectiveness of this device, of the 1,914 opinions projected for FY 1972, we project that Rule 21 opinions will comprise 40% of the total unsigned opinions. The following table covering the first eight months of FY 1972 is a further illustration:

TABLE 13.—SIGNED, PER CURIAMS AND PERCENTAGE OF RULE 21 OPINIONS FIRST 8 MONTHS FISCAL YEAR 1972

	Total opinions	Percentage rule 21
Signed.....	390	33.7
Per curiam.....	459	39.7
Rule 21.....	307	26.6
Totals.....	1,156	100.0

PROOF OF THE PUDDING—INNOVATIONS WORK—FIFTH CIRCUIT OUTPUT SHARPLY INCREASED

Despite spectacular annual increases in both the percentage and numerical rate of new filings the Court through these innovative practices has managed each year to turn out more cases than were filed the year before and in FY1971, for the first time at least since 1960, the Court turned out more cases than were filed in the current year, as this table shows:

TABLE 14.—FILING, DISPOSITIONS AND CARRY-OVER IN FIFTH CIRCUIT FISCAL YEAR 1960-1971

Fiscal year	Number cases filed	Number cases disposed of ¹	Carried forward to succeeding year
1960.....	584	554	278
1961.....	639	514	403
1962.....	717	598	522
1963.....	876	765	633
1964.....	1,033	931	735
1965.....	1,073	878	930
1966.....	1,099	1,028	1,001
1967.....	1,189	1,171	1,019
1968.....	1,347	1,290	1,076
1969.....	1,489	1,496	1,069
1970.....	1,794	1,682	1,101
1971.....	2,077	2,079	1,179
1972.....	2,596 (est.)		

¹ In but 5 years our volume has increased by 978 cases (89 percent) from 1,099 in fiscal year 1966 to 2,077 actual cases in fiscal year 1971 (all consolidations and cross appeals eliminated), and a 225 percent increase in the last 10 years. The 2 year increase fiscal years 1969-1971 totaled 588 cases. For this current fiscal year 1972 alone we expect a further increase of 519 cases for a total increase in 3 years of 1,107 cases (74.3 percent increase). While there has been an exponential increase in the number of cases filed, since 1967 the Court has disposed of more cases than filed in each preceding year, with 1971 showing more closed (2,079) than filed (2,077), and the carry over to the succeeding year has been disproportionately smaller. At the same time there has been a marked reduction from 12.5 months to 6.5 months in fiscal year 1971 of the median time from the filing of the complete record to the final disposition of the appeal, while the national average is 7.6. See table B-4 A.O. 1971 report.

For an appellate Court, termination largely depends upon the number of cases the Judge can hear and dispose of by a written opinion. The following Table 15 shows the numerical and percentage increase from FY 1968 to FY

1971 in output by the Court and the opinions per active Judge. As the Court has been increased by additional judgeships to its current maximum statutory complement of 15, the analysis was made on the basis of individual Judges, not just an average. In this relatively short period of time the Court's disposition by opinion has increased 74.3%, its total dispositions by 61.2%. The reason for this is the spectacular increase of 75.4% in the opinion output per active Judge as shown by the following table:

TABLE 15.—NUMERICAL AND PERCENTAGE INCREASE IN OUTPUT

	Fiscal year				Percent increase 1968-71
	1968	1969	1970	1971	
(a) Output by opinions.....	953	1,129	1,271	1,661	74.3
(b) Output other than by opinions.....	337	367	411	418	24.0
(c) Total closed cases.....	1,290	1,496	1,682	2,079	61.2
(d) Opinions per active judge.....	61	72	82	107	75.4

TABLE 16.—*Opinion output comparison fiscal year 1971-70*

Fiscal year 1971:		
Signed.....		676
Rule 21 ¹		210
Per curiams.....		775
Total.....		1,661
Fiscal year 1970:		
Signed.....		638
Per curiams.....		633
Total.....		1,271

¹ Since August 14, 1970 rule 21 summary affirmance opinions have comprised 30.8 percent of per curiams, but in current fiscal year 1972 they run 40 percent. (See table 13.)

The median number of opinions per active Judge increased from 87 in FY 1970 to 108 in FY 1971, a numerical increase of 21 and a percentage increase of 24.

All this shows why the Fifth Circuit ranks No. 1 in the total number of judicial terminations after hearing or submission on briefs. Our total is 117 against a national average of 78. Our 117 total was an increase from 72 in 1968. (See A.O. "Management Statistics", statistical profile.)

INNOVATIONS HAVE AVOIDED SCANDALOUS BACKLOG

Not only have these innovated procedures enabled the Court continuously to increase its output, but a direct consequence of this is that the Court has been able thus far to avoid backlogs which would otherwise have been of scandalous proportions. It is necessary, however, at this point, to sound the specific caveat that we have reached the maximum of our productive output unless as discussed in Part Two, the Congress effectively gives us much needed help both to the Judges' staff and to the Court as an institution for the performance of judicial functions.

There are many who deplore the high percentage of Summary II decisions without oral argument, but to these criticisms, the answer is a simple one.

Were we not to use the methods we have employed and the new ones being initiated we would be in an absolute state of chaos with scandalous cumulative backlogs. This is because in order to dispose of all of these cases on oral argument, we would have to have a startling number of court weeks way beyond the capacity of our own Judges which in turn would require an impossible number of visiting Judges. This is illustrated by the following on the assumption of 30 visiting Judges with the annual and cumulative backlog resulting.

TABLE 17.—CUMULATIVE BACKLOG UNLESS HELP COMES

	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Cases for judicial disposition.....	1,764	1,904	2,043	2,234
Backlog from preceding year.....	20	280	780	1,440
Total cases for oral argument.....	1,784	2,184	2,823	3,674
Court weeks required (20 per week).....	84	109	142	184
Court weeks serviced by active Fifth Circuit judges.....	60	60	60	60
Total visiting judges required.....	72	147	246	372
Backlog (assuming 30 visiting judges available).....	280	780	1,440	2,280

NOTE: These impossibilities highlight why our success for fiscal year 1971 is due to our new procedures. Without screening and on oral argument only, on the same basis as this table, we would have required 76 court weeks with 48 visiting Judges, an impossible attainment.

This material is put forward not to show that we do better than anyone else or that others could or should adopt our systems. Every Circuit, whether on present or future alignments, will have unique problems. I offer it in this detail to demonstrate that there is a tremendous, untapped capacity for output that Judges and Courts are not aware of until they experiment. It is of importance here because the Commission cannot really determine how many Judges and therefore how many Circuits are needed until it first ascertains what it is Judges or groups of Judges in a collective Court can do.

SIGNIFICANCE OF PART TWO OF THIS STATEMENT

Although Part Two is submitted in response to the request of the chairman that we discuss the proposal made by the Fifth Circuit and approved by the Judicial Conference to establish a staff of Legal Assistants to the Court of Appeals, the comments made and the data supplied have a direct bearing upon all of these matters concerning Circuit realignment. They demonstrate the urgency in point of time as almost a last ditch means of avoiding scandalous backlogs and a near breakdown. They demonstrate as well the significance of the problems which must be studied by a Commission and on which it must make deliberative decisions if its work is to be anything more than a momentary stop gap. Consequently, Part Two is an essential consideration for Part One.

CONCLUSION OF PART ONE

I end as I began: I am wholeheartedly in favor of the establishment of this Commission. This analysis demonstrates, I believe, that the Commission cannot intelligently draw those lines without first making an in-depth study of what the role of the Court of Appeals ought to be, what we can tolerate, what we can survive under, what statutory changes should be wrought to bring the workload within reasonable capabilities, and an objective determination of what Judges and Courts reasonably ought to be expected to do and accomplish by the imaginative use of new methods and procedures.

Part Two

ESTABLISHMENT OF LEGAL ASSISTANTS TO THE FIFTH CIRCUIT

After submission to the Subcommittee on Supporting Personnel with data substantially that reflected in Parts One and Two of this statement, that Subcommittee recommended to the Committee on Court Administration that significant additional personnel be made available to the Fifth Circuit because of the urgency of the problems facing it. This request did not ignore the possibility or likelihood of circuit realignment. To the contrary, the Fifth Circuit urged these proposals as one of the ways by which a productive output could be increased with no sacrifice to the quality of justice both as a long range proposition and the short range emergency. By the October, 1971 resolution (App. A) the Judicial Council recognized that even with the enactment of some sort of legislation creating a commission or otherwise to recommend circuit realignment, there was no likelihood that effective relief could be afforded within two to three years at the minimum. In the meantime, the Court is facing further explosive increases in filings so that unless something drastic is

done without delay, disturbing backlogs will occur and, at least for many litigants, there may be almost an exclusion from *any* appellate review in the Fifth Circuit.

The Judicial Conference of the United States approved the recommendations of the Committee on Court Administration as shown by the minutes of the October, 1971 meeting.

To fund these approved positions, the Budget Committee recommended, and the Judicial Conference approved the request for funds covering (a) Judges' Staff (1) (2) (3) (4) (5), but deferred action pending substantive legislation on Part (b) for Serving the Whole Court (1) (2) (3) as follows.

Estimates for 1973

The estimates approved for fiscal year 1973 for the judiciary, exclusive of the Supreme Court, the Customs Court and the Federal Judicial Center, aggregate \$180,428,000, an increase of \$19,234,000 over the amounts appropriated for 1972. The increase includes all funds requested for personnel approved by the Conference (see Report of Committee on Court Administration) but does not include the Fifth Circuit request for \$208,000 to establish a staff law office, for which the Budget Committee believed substantive legislation would be required.

PROPOSED SUBSTANTIVE LEGISLATION

Pursuant to the direction of the Judicial Conference, the Director of the Administrative Office sent to the President of the Senate and to the Speaker of the House his letter of February 7, 1972 (App. G) together with a proposed substantive bill (App. H) to authorize the creation of the positions in Part (b) (1) (2) (3) for Serving the Whole Court.

On receipt of copies of these I wrote to the distinguished Chairman of this subcommittee on February 29, 1972 to which the Chairman on March 17, 1972 responded stating that he would like to know what cost is involved for this legal assistance concept, salaries contemplated, and the secretarial or additional law clerk help envisaged.

As this ties directly into the problems discussed in Part One relating specifically to S. J. Res. 122, it is appropriate to attempt to furnish this data and further supporting material through this statement which, hopefully, will result in the early introduction and enactment of substantive legislation of the kind proposed (App. H) or any other suitable type.

WE CANNOT WAIT UNTIL CIRCUIT REALIGNMENT

As Part One makes emphatic, the Fifth Circuit is all for national circuit realignment. It is all for the Commission form of approach. It reiterates its unqualified endorsement for early enactment of such a structure, but the Court must face reality. Already a year has gone by since the first Commission-type legislation was introduced (H.R. 7378, April 7, 1971) and only now has this progressed to a revised bill reported out of Committee (March 7, 1972). Similarly, the present hearings are the first under S.J. Res. 122. No criticism of either the Senate or the House is even remotely suggested. We accept this as an inevitable part of the legislative process in a body that literally has the cares of the world upon its shoulder. Indeed it is this unavoidable delay which leads us to sound this strong note of urgency. We have to be realists. Considering the pressures upon the Congress it would be optimistic to anticipate enactment of circuit realignment legislation earlier than a year from now. By that time the current FY 1972 will have been history, and FY 1973 will have run three quarters of its course. Even assuming enactment within a year, there is little reason to believe that the Commission would be appointed and at work in less than 6 months thereafter. That is well into FY 1974. Considering the nature of the problems which must be investigated (as we have outlined in Part One) and as S. J. Res. 122 prescribes (see page 10) it would be a year before the Commission could complete its investigation and arrive at its recommendations.⁴ That day is on the eve of FY 1975. Since the Commission concept in S. J. Res. 122 (and revised H. R. 7378) now calls for a recommendation and report to the Congress, there can be no effective change until the Congress enacts

⁴ Of course, S. J. Res. 122 allows two years. In the revised bill reported to the House, H. R. 7378 reduces the time to "one hundred and eighty days [from] the date on which [the] ninth member [of the commission] is appointed". See Sec. 6.

legislation approving or disapproving the Commission's recommendations or otherwise determining the basic problems of the system of Federal Courts of Appeals and, specifically, the geographic realignment of the Circuits. By this time FY 1975 has gone. Additionally, as our analysis in Part One demonstrates, redrawing Circuit lines is no solution at all. The business is still there. This means in many realigned Circuits there is still need for additional judgeships. This in turn calls for substantive legislation of a kind which traditionally takes not less than a year. As a certainty, we are speaking then of FY 1976.

In the meantime business goes on in the six states of the Fifth Circuit. Business means marked increase in District Court filings. This means increased appeals and with no added judgeships beyond 15 something must give. So alarming is our situation that it bears repeating the January 1972 FY 1972-75 projections (set out in more detail in Table 1, page 14).

TABLE 18.—PROJECTION OF FILINGS, FISCAL YEARS 1972-75

Fiscal year	1970 Shafroth Survey	September 1971 upward revision, Fifth Circuit	Upward revision percentage increase
1971-----	1,852	2,077	15.8
1972-----	2,006	2,596	25.0
1973-----	2,159	2,794	7.6
1974-----	2,311	2,990	7.0
1975-----	2,464	3,188	6.6
Cumulative increase fiscal years 1971-75-----			53.5
1981 ¹ -----		6,750	² 38,875

¹ Fiscal year 1981 projections based on 225 percent increase (267 percent with cross appeals) in Fifth Circuit fiscal years 1961-71 and 204 percent national increase as reflected by table 2 A.O. 1971 report (cross appeals and multiple parties excluded).

² National (all circuits).

Experience, including the certainty of meeting the projection of nearly 2600 for the current FY 1972, demonstrates that these upward revisions over the 1970 Shafroth Survey will prove true. This produces an increase of the case-load per Judge from 173 in FY 1972 to 212 in FY 1975, and an accumulative percentage increase, 1975 over 1971 of 53.5%

This becomes aggravated by the nature of the cases, especially those commanding the highest priority such as direct criminal appeals and post conviction cases.

CRIMINAL CASES AGGRAVATE THE PROBLEM

From 1965 criminal appeals increased from 180 to 439 (FY 1971)—a 144% increase in contrast to civil cases which increased from 874 in 1965 to 1,598 (FY 1971) for an 83% increase. Significantly, during the last of FY 1971 the percentage of criminal and post-conviction cases increased over FY 1970 from 38.6% to 43.2% with a consequent decline in civil cases from 61.4% to 56.8%.⁵

On the indicated projections and the percentage composition of docket filings (see Table 8), the workload for criminal (and related) cases will be not less than the figures shown on the following Table:

TABLE 19.—PROJECTED DIRECT CRIMINAL, HABEAS AND SECTION 2255 FISCAL YEAR 1972-75

Subject matter	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Criminal (20.7 percent)-----	537	578	618	660
Habeas (16.0 percent)-----	415	447	478	510
Section 2255 (4.8 percent)-----	124	134	143	153
Total (41.5 percent of docket)-----	1,076	1,159	1,239	1,323

⁵ See App. D in the Shafroth 1970 survey showing disparity between increase in trials and appeals as between civil and criminal cases.

INCREASED JUDGE OUTPUT THE ONLY ALTERNATIVE TO SCANDALOUS BACKLOGS

Despite what the Court has done through the full exploitation of innovative methods and the spectacular results which have so far enabled it to keep abreast of the constantly increasing input, it is now certain that *unless* very significant increases in Judge output can be attained, the Court will have backlogs which approach dangerous if not scandalous proportions. On the most optimistic basis of assuming each active Judge can write opinions in 110 cases (not counting school cases and administrative matters which are in addition to this caseload) FY 1972 will end with a backlog of 114 cases. On the usual basis of 20 cases per week this is close to six weeks of Court. This at first seems small but it goes over to the next year and adds to the backlog of that year and so on through FY 1975 as reflected by the next table:

TABLE 20.—PROJECTED BACKLOG ON BASIS OF 110 OPINIONS PER ACTIVE JUDGE

[Excluding school cases or opinions in administrative matters]

	Fiscal year			
	1972	1973	1974	1975
On basis of 110 opinions per active judge:				
(a) Ready cases remaining for hearing or submission.....	1,764	2,064	2,525	3,171
(b) Less: Maximum 110 cases (opinions) per 15 active judges.....	1,650	1,650	1,650	1,650
(c) Backlog of ready cases.....	114	414	.875	1,521

The backlog for FY 1973 (414) will actually exceed the entire input in FY 1971 for the First Circuit (383 cases). The cumulative backlog for FY '74 (875) will exceed the current filings in FY 1971 of the Tenth Circuit (734), the Eighth Circuit (713), the First Circuit (383) and will nearly equal that of the Seventh Circuit (902). And in FY 1975 the cumulative backlog (1521) will exceed the whole year's input for FY 1971 of every Circuit except the Ninth (1936) and the Fifth (2316). (See AO Table 4, page II-9). Just the backlog alone would exceed our own total filings for FY '68 (1489). At 20 cases per week the backlog alone would be the equivalent of 76 courtweeks. On an experience-demonstrated capacity of a maximum of 10 weeks of actual Court sittings these 76 weeks would require 228 judge weeks or a total demand for 78 visiting Judges. These are simply unobtainable and a number of weeks would have to be manned by panels made up of a majority of non-Circuit Judges of the Fifth Circuit—a condition we found out by actual experience to be very unsatisfactory to the Bar, to the Court as an institution, and to the sound development of the law. But of course one cannot consider just the backlog (1,521) and for the Court to dispose of current FY 1975 cases ready for submission (1,793), there would be a total of 3,314 cases or the equivalent of 166 court weeks requiring 348 visiting Judges!

We must again sound the caveat: we know we simply cannot keep abreast of this increased business in FY 1973-75. Some backlogs will develop. Indeed, unless some help is forthcoming without delay, we cannot even keep up the pace we have set for ourselves during FY 1968-71 and which will increase in the current FY 1972. On the other hand, most of us feel that with substantial help made available *now* we can—with safety to our own health and the quality of justice—increase our output.

ADDITIONAL AGGRAVATING ADVERSE FACTORS

Approaching it purely from a question of the whole docket composition, the outlook is bleak with huge backlogs inevitable. To the statistical averages must be added other adverse factors which makes it even worse.

EXPEDITING CRIMINAL APPEALS

On its own and after much study the Judicial Council of the Fifth Circuit in its January 1972 meeting adopted a formal plan for expediting criminal appeals.

Under the Plan the Court has now adopted a stringent schedule under which the most significant and immediate impact is on the Judges themselves. The Court has fixed a period of 6 months as the maximum time for disposing of criminal case. To accomplish this, internal procedures are set up which are streamlined to assure that no time is lost and no cases get in default for failure of counsel or court reporters to comply strictly with the rules. Most significant, the Judges have pledged to dispose of every criminal case within half the time ordinarily considered to be prompt disposition. With the large number of direct criminal appeals plus the post-conviction cases projected for FY 1973-75 (see Table 19), the Judges cannot meet this rigid time schedule and keep up with the balance of the cases (approximately 58-60% civil). Thus, by the Court's self-imposed and Judicial Conference-imposed expediting mandates the general backlog at least of civil cases will be more than that projected above (see Table 20).

THREE-JUDGE COURT CASES

In addition to the growing increase in the caseload of the Court of Appeals itself, three-judge court cases are a substantial part of the activities of Active Circuit Judges. The extent to which this is such a burden is shown below which reflects the number of three-judge courts constituted by me in the short period that I have been Chief Judge (since July 17, 1967). They total 512 and as of February 16, 1971 294 were pending. The breakdown is shown by districts and states.

TABLE 21.—TOTAL DESIGNATED 3-JUDGE CASES SINCE JULY 17, 1967 TO FEBRUARY 16, 1972

State	Districts					Total
	Northern	Middle	Southern	Eastern	Western	
Alabama.....	16	30	9			55
Florida.....	29	39	50			118
Georgia.....	78	5	8			91
Louisiana.....				67	23	90
Mississippi.....	22		36			58
Texas.....	41		27	2	30	100
Total designated since July 17, 1967.....						512

TABLE 22.—PENDING 3-JUDGE CASES

State	Districts					Total
	Northern	Middle	Southern	Eastern	Western	
Alabama.....	5	16	7			28
Florida.....	11	15	18			44
Georgia.....	53	2	9			64
Louisiana.....				52	18	70
Mississippi.....	11		16			27
Texas.....	24		18	2	17	61
Total pending as of February 16, 1972.....						294

The workload on Active Judges (Senior Judges are available for only a few of these cases) is shown by Table 23 which has been updated to February 10, 1972. This shows the pending cases which each of the Judges listed now has responsibility for as the presiding member of the three-judge panel.

TABLE 23.—*Pending three-judge courts by judges as of February 10, 1972*

Case load per circuit judge:

Alabama:		Louisiana:	
Rives.....	16	Wisdom.....	36
Gewin.....	5	Ainsworth.....	34
Godbold.....	7	Mississippi:	
Florida:		Coleman.....	13
Jones.....	1	Clark.....	14
Dyer.....	11	Texas:	
Simpson.....	19	Brown.....	8
Roney.....	13	Thornberry.....	14
Georgia:		Goldberg.....	19
Tuttle.....	9	Ingraham.....	20
Bell.....	27		
Morgan.....	28		

IMPACT OF PRIORITIES ON BACKLOG

Priorities have been fixed by the Court (many controlled by statutes) covering 24 identifiable categories, the bottom one of which is "regular non-preference civil appeals" which are processed for decision or hearing in accordance with the "first-in—first-out rule". An actual analysis of the docket for FY 1971 (Table 24) shows the total number of preference cases. These comprise 51.8% of the entire actual docket.

TABLE 24.—*Fiscal year 1971 filings by established priorities*

Criminal appeals.....	544
1. Criminal Appeals (Rule 45(b) FRAP)	
2. Appeals from orders refusing or imposing conditions of release	
3. Difficult or widely publicized trials	
5. Organized Crime Control Act	
6. Selective Service Criminal Cases	
Habeas corpus and section 2255 appeals (Item 4).....	411
Interlocutory appeals (Item 9).....	11
National Labor Relations Board (Item 10).....	106
Other agency review.....	30
12. Immigration & Naturalization Appeals	
15. Administrative Orders, Review Act of 1966	
17. Federal Trade Commission Act	
Mandamus, prohibition, etc. (Item 7).....	32
Certain Federal questions.....	66
11. Social Security Appeals, 25	
13. Railroad Unemployment Ins. Act, 7	
14. Norris-LaGuardia Act, 21	
16. Clayton Antitrust Act, 13	
Total preference cases.....	1, 200
Total filings fiscal year 1971.....	2, 316
Percentage of docket requiring preference.....	51. 8

The disturbing thing is how important the so-called non-preference cases are or can be. These would include on a first-in—first-out basis: Civil Rights, U.S. Civil not include in priority list, Federal Questions not included in priority list, Tax Cases, Bankruptcy, Admiralty, and Diversity.

When backlogs develop, priorities can mean almost a complete exclusion of a case or cases. On the expectation that 110 opinions per Active Judge is the maximum output (unless significant help is afforded immediately), the projected backlog on the projected input will be:

TABLE 25.—PROJECTED BACKLOG WITH OR WITHOUT SCREENING ON BASIS OF 110 OPINIONS PER ACTIVE JUDGE

[Excluding school cases or opinions in administrative matters]

	Fiscal year			
	1972	1973	1974	1975
On basis of 110 opinions per active judge:				
(a) Ready cases remaining for hearing or submission.....	1,764	2,064	2,525	3,171
(b) Less: Maximum 110 cases (opinions) per 15 active judges.....	1,650	1,650	1,650	1,650
(c) Backlog of ready cases.....	114	414	875	1,521

The following table ⁶ illustrates how priorities work to cut off cases entirely once the maximum output of the Judges is reached.

TABLE 26.—FISCAL YEAR IMPACT OF PRIORITIES ON BACKLOG

	1972		1973		1974		1975	
	Cases	Cumulative total	Cases	Cumulative total	Cases	Cumulative total	Cases	Cumulative total
Direct criminal.....	429		474		513		558	
Habeas corpus.....	277	706	306	780	332	845	360	918
2255.....	91	797	101	881	109	954	120	1,038
Social Security.....	14	811	16	897	17	971	18	1,056
Civil rights.....	92	903	101	998	109	1,080	119	1,175
U.S. civil.....	122	1,025	134	1,132	146	1,226	158	1,333
Other agency.....	16	1,041	19	1,151	20	1,246	22	1,355
Federal question.....	309	1,350	341	1,492	370	1,616	403	1,758
Tax.....	99	1,449	109	1,601	118	1,734	129	1,887
Bankruptcy.....	26	1,475	29	1,630	32	1,766	34	1,921
National Labor Relations Board.....	62	1,537	68	1,698	74	1,840	78	1,999
Admiralty.....	14	1,551	16	1,714	17	1,857	18	2,017
Diversity.....	213	1,764	236	1,950	255	2,111	279	2,296

*Maximum cases which
can be calendared
for screening or
oral argument*

Opinions per active judge:

100×15.....	1,500
105×15.....	1,575
110×15.....	1,650
115×15.....	1,725

Thus, on the illustrative listing of priorities (see Note 6) the line drawn across the columns shows that in FY 1973 all NLRB, Admiralty and Diversity cases will be excluded. In FY 1974, priorities will exclude all Tax, Bankruptcy, NLRB, Admiralty and Diversity cases. And in FY 1975 it will exclude a major portion of non-priority federal question cases and all Tax, Bankruptcy, NLRB, Admiralty and Diversity cases. What is worse, with the operation of the priorities, some or all of these cases may *never* be reached, because while they would go over to the succeeding year to be calendared on the first come, first out basis, some or all could be "frozen out" in the succeeding year as the 51.4% of priority cases in themselves exceed the total maximum Judge output (1650 cases).

THE WORKLOAD AHEAD DEMANDS IMMEDIATE RELIEF

Although we again emphasize that we cannot hope to cope completely with these projected explosive increases, the magnitude of the problem is well illustrated by App. J which shows the projected workload per Active Judge (on the basis of 60% Summary II's) in terms of opinion writing and participation as a panel member in Summary II cases, those orally argued and Administra-

⁶ Special Note: The table was worked up for the Court's use as an illustration and does not list the categories in the correct order of priority.

tive and School Cases. Assuming no backlog the workload per Judge runs from 477, FY 1972 to 653, FY 1975. Acknowledging that we cannot hope to cope with all of the increase year by year the Court does wish to increase its output to the maximum extent of human physical resources and the creditable performance of just and fair dispositions.

TO MINIMIZE BACKLOGS HELP IS NEEDED NOW

We must find ways by which, without sacrifice of quality and no possible abdication of independent, judicial responsibility, the Judges' output can be markedly increased. Our own experience indicates that the most likely source of expansion of increased productivity will come through intensified screening, and increased effectiveness of Summary II's without oral argument. This can only happen by the availability and full utilization of adequate supporting staffs, both legal and secretarial, to the Judges and to the Court as a whole in the performance of judicial responsibilities.

PERSONNEL REQUESTED FOR JUDGE'S STAFF

As shown in the excerpt from the Judicial Conference Report (see page 83) Part (a) covers increase in the Judge's staff to provide an additional secretary, law clerk and clerical assistant for each active Circuit Judge (with some additions for the Chief Judge). Although these approved positions depend only on funding and no substantive legislation is required or proposed we mention these because of the responsibility which the Senate Committee on the Judiciary has in assuring that there is not a near breakdown in the Fifth Circuit. All recognize the working necessity of the Congress acting through its committees. But the urgent seriousness of our plight transcends the technical confines of committee structures. No committee is in a better position, nor it seems to us has a greater obligation, to sound this sense of urgency to the Senate Committee on Appropriations, to the Senate and the Congress than this distinguished Subcommittee dedicated to improvement in judicial machinery. Certainly "improvement" encompasses action to prevent a breakdown or failure in the machinery.

PERSONNEL FOR SERVING THE WHOLE COURT

This is covered in Part (b) and calls for the following:

	Total
(1) Chief staff attorney-----	1
(2) Additional staff attorneys (5)-----	8
(3) Secretaries for staff law clerk's office (3)-----	4

(1) Chief Staff Attorney.

(2) *Five additional Staff Attorneys:*⁷ This project contemplates the establishment within the Court's structure of a Staff Attorney's office. It is essential, we think, to get away from the concept of either *pro se* clerks or law clerks to the Court. The prestige of these people needs to be enhanced. Each of the Staff Attorneys should be a mature person compensated in the range of \$15,000. The Chief Staff Attorney should have maturity, exceptional managerial professional attainments and supervisory ability. Compensation should be in the range of \$25,000-\$30,000.

In our screening procedure we have used the present 3 *pro se* clerks (attached to the Clerk's office) very effectively in the handling of *pro se* matters, certificates of probable cause and in forma pauperis applications, habeas, \$2255 cases, and in direct criminal appeals. This has demonstrated that staff clerks are a most effective tool. They should be assigned to the Court as an institution where they can work closely together under competent supervision. But they need to be adequate in number and receive compensation which will attract the persons having the required professional resources.

The pressure for expediting criminal appeals discussed above offers both the most immediate need and opportunity to exploit fully the professional talents of such a group. Under the Court's commitment to dispose of these cases

⁷ To meet the ever-growing docket we have been afforded three so-called *pro se* clerks who are lawyers attached to the Clerk's office. The five requested in this project are in addition so that as the table shows, there would be a total of 8 Staff Attorneys.

within 6 months (not an average, but in fact in 6 months) and a pledge by the Judges to dispose of the opinions within one-half the ordinary time, it will be essential that every criminal case (direct and post-conviction) be carefully analyzed in advance of submission to the Judge and his staff by the Staff Attorneys. This would most often take the form of legal research leading to a memorandum for use by the Judges in drafting opinions. In the screening process the Judge would then be able to determine readily whether it should be classed for oral argument (Class III or IV) or disposed of as Summary II. On studying the record and briefs, the Judge would have the Staff Attorney for ready consultation. In the meantime, this would free the Judges' own staff of law clerks (presently 2 and 3 as now requested in the pending budget) for memoranda in advance of oral argument in the cases classed III and IV and the preparation of drafts in the cases heard on oral argument and assigned to that Judge for opinion-writing.

It is certain as anything can be that unless the nation is prepared to accept the prospect of scandalous backlogs under the present system of appeal as a matter of right in every federal case the system is going to break down. The hope is to learn how to employ and effectively use paralegals under competent direct supervision which does not infringe upon the Judges' inescapable sole responsibility and judicial independence. Staff Attorneys of a high professional order are an answer, an answer which needs to be fully exploited.

The Fifth Circuit has a need for this help that is critical. The Fifth Circuit has proved that it can innovate and make new ideas work. The Court is confident that it can make this idea work, and without such assistance we are certainly headed for serious trouble.

(3) *Secretaries for Staff Law Clerk's Office*: This is a perfectly obvious request to enable these professionals to perform professional duties without subjecting them to the tedious and wasteful operations of being their own typists. As described above it is essential that the flow of the cases move without delay and in a way by which the preliminary analysis, recommendation, proposed drafts, etc. of the Staff Attorneys can be effectively employed by the Judge. This means a tremendous amount of stenography. But stenography is cheaper than backlogs.

We, therefore, earnestly assert that each of the positions in Subpart (b) are needed and can be effectively employed, and will enable the Court to continue increased output.

Of course, there would be added costs for such things as furniture, fixtures, supplies. Undoubtedly the Administrative Office is in the best position to give estimates on this.

But on the estimate of the new added costs of \$129,000 above and adding a liberal 25% overhead the aggregate of the estimated \$161,000 is small indeed. It is small in terms of what can be accomplished, more so, in what can be avoided—backlogs and breakdowns, complete or partial—and small in contrast to costs incurred for additional judgeships.

PROBABLE COSTS FOR LEGAL ASSISTANTS TO COURT

Although the Judicial Conference Budget Report states the estimated cost at \$208,000, the direct costs stated in round numbers would appear to be as follows:

	Present clerk's payroll	New commitment
Chief Staff Attorney.....		\$30, 000
Staff Attorneys:		
Five additional.....		75, 000
Three present pro se.....	\$39, 000	
Secretaries:		
Three additional.....		24, 000
One clerk's office.....	8, 700	
Subtotal.....	47, 700	129, 000
Total present and new.....		176, 700

The Congress is fully informed as to the initial costs of each new Judgeship. High as are these initial costs there is a recurring annual expense for the support of the Judge, his office and his staff. On the conservative estimate that 3 additional judgeships would be needed to handle these projected increases the annual cost would be not less than :

Three judges.....	\$127, 500
Six law clerks.....	78, 000
Three secretaries.....	36, 000
Total.....	241, 500
If additional personnel part (a) is funded:	
Three law clerks.....	40, 000
Three secretaries.....	33, 000
Subtotal.....	73, 000
Total.....	314, 500

PROPOSED STAFF LEGAL ASSISTANTS TO COURT OF APPEALS FURNISHES EXPERIENCE
FOR NATIONWIDE ADAPTATION

Although as approved by the Judicial Conference and as covered in the proposed substantive legislation this is for the Fifth Circuit alone, the Fifth Circuit will not be the lone gainer. Circuit realignments are bound to come. The simple statistics, Circuit and nationwide, show that unless the system is to break down of its sheer weight in the proliferation of new Circuits some very drastic and novel changes must be made. The most likely solution is bound to be in the form of additional supporting personnel composed of highly trained, adequately compensated professionals with sufficient administrative and secretarial support.

What the Fifth Circuit will learn in the use of this organized staff of Legal Assistants to the Court will be of great value to other Circuits, no matter how realigned. The characteristic of the handling of the judicial machinery is that we always wait until the crisis is at hand and chaos is approaching. Facing the staggering prospect of 38,875 appeals in all the Courts of Appeals in FY 1981 (see Tables 1 and 18) and the equally staggering prospect of 35 additional Courts of Appeals if the structure is to be simply the traditional one of a 9-Judge Court (see page 28), it is the part of good sense and good management to explore for new methods and then exploit them fully in practice to determine their strength and weaknesses for use or adaptation by others. No longer is the Fifth Circuit the sole source of concern. Now there are a number of Courts of Appeals facing problems equally acute and nearly all of them translate in terms of increased input and the need for increased output.

CIRCUIT REALIGNMENTS MUST COME

Unless they are to be repeated every five or ten years Circuit realignment must be done after an intelligent inquiry in depth. The Commission charged with the responsibilities under S. J. Res. 122 can supply that intelligent direction and recommendation for subsequent congressional action. In the meantime, the Fifth Circuit, restricted as it is under the statute to a Court of fifteen active Judges, but still, with the sole responsibility for the whole of the Circuit, faces demonstrable burdens which it cannot meet in full. Until Circuit realignment is an accomplished fact and necessary judgepower is afforded and deployed by Congressional action the Court is faced for FY 1973-75 with a real emergency. It must have help. It must have help now.

STATEMENT AND RESOLUTION, JUDICIAL COUNCIL, FIFTH CIRCUIT

The Fifth Circuit along with other circuits is faced with awesome prospects. In 1960 the case filings were 584. In FY 1971, the year just closed, they were

2077. In the first quarter of the current year 1972 filings have gone up another 25% for a projected numerical increase of 519 to make a total of 2596.

The situation is grave. By separate resolution we have endorsed without reservation HR 7378 for circuit realignment. But even with early enactment of the bill, the appointment of the Commission, the comprehensive investigation contemplated, the making of its report and action thereon by the Congress, the time would, in our opinion, run a minimum of two years. Considering that almost every conceivable realignment of the states comprising the Fifth Circuit will call for added Judgeships, the time would in all likelihood stretch into at least a third year through FY 1975.

In that interim things would become critical, for on the most conservative projections in the next three years, filings will increase to 2794, 2990, and 3188 (FY 1973-75) to produce cumulative backlogs of 714 in FY 1973, 1325 in FY 1974, and 2121 in FY 1975. As a result, this Circuit will be virtually unable to handle any cases other than those falling within categories of cases which Congress has invested with a priority status.

The Council therefore directs the Chief Judge to bring this to the attention of the Judicial Conference of the United States at the October 1971 meeting with the request that the Conference and its Committees communicate the Fifth Circuit's sense of the urgency of the situation to all those in a position of responsibility in the Executive and Legislative Branches.

Attest:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals for the Fifth Circuit.

The following motion was moved by Judge Wisdom, seconded by Judge Ainsworth, and unanimously adopted:

The number of appeals in federal courts have increased to the point where under the existing circuit system the federal administration of justice is in danger of breaking down from the overload. All filings increased from 3,889 in F.Y. 1960 to 10,748 in F.Y. 1970, and for 1980 filings of 34,881 are projected. In the Fifth Circuit, appeals increased from 577 in 1960 to 2,077 in 1971 to 2596 (projected) for this year. The most conservative arithmetic projections disclose that by F.Y. 1973 this Circuit will be virtually unable to handle any cases other than those falling within categories of cases which Congress has invested with a priority status.

Despite this imbalance in the system, there has been no realignment of the circuits in over eighty years except for the establishment of the Tenth Circuit.

The Administrative Office, after a careful survey of all the circuits, concluded that for this court to continue functioning effectively seven judges should be added to the court.

This Judicial Council holds strongly to its prior formal determination that to increase the number of its judges beyond fifteen would diminish the quality of justice in this Circuit and the effectiveness of this Court to function as an institutionalized federal appellate court.

The Congress now has before it H.R. 7378 to establish a Commission on Revision of the Judicial Circuits of the United States.

Be it resolved therefore, That the Judicial Council of the Court of Appeals for the Fifth Circuit, without any reservations, endorses H.R. 7378 as an indispensable first step toward improvement in the federal circuit court system. To remove any doubt as to the Commission's authority, the Council recommends that the bill be amended so that it will state explicitly that the Commission may recommend, where needed, the appointment of additional judges along with the geographical reorganization of the circuits.

Attest:

EDWARD W. WADSWORTH,
Clerk.

ADDITIONAL CIRCUIT JUDGESHIPS NEEDED 1972 AND 1975; SHAFROTH ON PROJECTIONS (UPDATED TO 1970)

Circuit	96 case load average									
	1972					1975				
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)		
	Present number judgeships (1970)	Shafroth projection (1970)	Exceed 864 by	Added judges needed 1972, compared 1970	Shafroth projection (1970)	Exceed 864 by	Added judges needed 1975, compared 1970	Judgeships per circuit, 9 or more		
Second	9	983	119	1	1,177	313	3	12		
Third	8	749			874	10				
Fourth	18	1,426	562	7	1,820	956	11	19		
Fifth	15	2,006	1,142	6	2,464	1,600	10	25		
Sixth	8	867			981	117	1	9		
Seventh	8	809			968	104	2	10		
Eighth	13	1,719	855	5	2,166	1,302	10	23		
Ninth	7	713			824					
Tenth	9	1,025	161	2	1,478	614	6	15		
District of Columbia				21			42			
Total										

1 Note.—One added as recommended by 1970 Shafroth report.

PERCENTAGE INCREASE IN CIVIL AND CRIMINAL TRIALS AND INCREASE IN APPEALS—FIFTH CIRCUIT FISCAL
YEAR 1961-69

Fiscal year	Number of judgeships		Total trials	Total civil and criminal appeals filed	Civil trials	Civil appeals	Criminal trials	Criminal appeals
	Circuit	District						
1961.....	7	33	1,770	512	1,159	408	611	104
1962.....	9	45	1,975	529	1,328	422	647	107
1963.....	9	45	2,227	679	1,463	528	764	151
1964.....	9	45	2,154	818	1,418	687	736	131
1965.....	9	45	2,292	879	1,596	702	696	177
1966.....	9	45	2,478	873	1,669	664	809	209
1967.....	13	58	2,703	949	1,869	703	834	246
1968.....	13	58	2,960	1,159	2,034	820	926	339
1969.....	15	58	3,162	1,372	2,257	1,049	905	323
Percent change 1969 over 1961.....	114.3	75.8	78.6	168.0	94.7	157.1	48.1	210.6

Note.—Beginning with 1962 the number of appeals in each year under each category have been reduced by the number disposed of by consolidation.

Source: 1970 Shafroth Survey.

CLERK'S WEEKLY SCREENING REPORT¹

Week	Substitute	Retired	Outstanding	Reclassified	Classification (after adjustments)				Weekly percentage		Overall percentage		
					I	II	III	IV	Total	Excluding without council	All cases	Excluding without council	All cases
Outstanding from report of:													
Dec. 31, 1971	74					32	13	2	47	63.4	68.1	68.1	
Jan. 7, 1972	28	47	55			5	13	1	19	12.5	26.3	56.1	
Jan. 14, 1972	42	19	78	3									
Jan. 21, 1972	43	64	57	4		35	22	7	64	50.0	49.6	55.4	
Jan. 28, 1972	22	34	45	1		19	12	3	34	51.6	55.9	55.5	
Feb. 4, 1972	39	28	56	1		11	13	4	28	29.2	39.3	53.1	
Feb. 11, 1972	36	28	64	3		19	7	2	28	59.1	67.9	55.0	
Feb. 18, 1972	35	24	75	1		12	7	5	24	42.9	50.0	54.5	
Feb. 25, 1972	36	49	62			27	14	8	49	51.1	55.1	54.6	
Mar. 3, 1972	38	41	59	3		22	15	4	41	47.2	48.3	54.5	
Mar. 10, 1972	42	42	59	4		26	14	2	42	55.6	61.9	55.3	
Mar. 17, 1972	30	29	60	2		21	8	0	29	68.0	72.4	56.5	
Mar. 24, 1972	38	28	68	2		10	16	2	28	28.0	35.7	55.2	
Total	501	433	68	24		239	154	40	433				

¹ Calendaring requirements: Weeks required, 4; period, May; cases required, 80; unassigned III and IV, 48; deficiency, 32; and needed by, April 3, 1972.

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER—FISCAL YEAR 1971

Subject matter	Cumulative percent prior period	Current monthly filing percent	Current overall percent	Total	July	August	Septem- ber	Octo- ber	Novem- ber	Decem- ber	Jan- uary	February	March	April	May	June
Direct criminal	21.9	24.2	22.1	459	37	25	30	41	42	45	30	41	37	43	36	52
Habeas corpus:																
with counsel	5.0	4.6	5.0	104	7	9	6	5	12	9	8	7	14	10	7	10
without counsel	11.1	10.2	11.0	229	9	16	20	19	20	17	19	11	26	30	20	22
2255:																
with counsel	1.2	0.5	1.2	24	1	1	5	6	0	1	2	2	4	1	0	1
without counsel	4.1	2.8	3.9	82	12	6	3	9	6	7	2	10	7	7	7	6
Subtotal	43.3	42.3	43.2	898	66	57	64	80	80	79	61	71	88	91	70	91
CIVIL:																
Private Civil	27.7	31.2	28.1	583	48	46	48	42	28	47	53	34	58	52	60	67
Diversity		(13.5)	(11.5)	(239)	(20)	(18)	(23)	(19)	(13)	(25)	(25)	(15)	(15)	(11)	(26)	(29)
Federal question		(17.7)	(16.6)	(344)	(28)	(28)	(25)	(23)	(15)	(22)	(28)	(19)	(43)	(41)	(34)	(38)
U.S. Civil		10.2	8.1	170	16	16	7	15	23	5	12	7	17	14	16	22
Tax	7.9	4.9	4.9	102	11	10	5	6	8	11	7	10	8	6	8	12
Bankruptcy	4.8	5.6	4.9	36	2	0	4	3	5	3	3	3	1	4	6	2
N.L.R.B.	1.8	0.9	1.8	86	12	5	5	1	4	8	13	3	13	10	5	7
Other agency	4.3	3.2	4.2	25	5	1		1	3	0	0	2	2	3	8	0
Civil rights	1.4	0.0	1.3	99	9	9	8	7	6	7	0	4	17	12	12	8
Admiralty	4.9	3.7	4.5	14	3	2	1	0	0	0	1	0	0	4	2	1
School	0.7	0.5	0.7	64	15	17	9	5	2	2	4	2	2	1	0	5
Subtotal	3.2	2.4	3.2													
Subtotal	56.7	57.7	56.8	1,179	121	106	87	80	79	83	93	65	118	106	117	124
Grand total	100.0	100.0	100.0	2,077	187	163	151	160	159	162	154	136	206	197	187	215

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER—FISCAL YEAR 1972

Subject matter	Monthly percent 1972 (a)	Overall percent		1971 cumulative average (c)	1972 cumulative total (d)	July	August	September	October	November	December	January	February	March	April	May	June
		1971 (b)	1972 (b)														
Direct criminal	13.3	22.1	20.7	268	305	49	40	37	41	61	49	28					
Habeas corpus:																	
With counsel	6.2	5.0	6.0	61	89	8	10	10	14	17	17	13					
Without counsel	11.9	11.0	10.0	133	147	25	26	20	17	16	18	25					
2255:																	
With counsel	0.5	1.2	1.0	14	14	1	4	1	3	2	2	1					
Without counsel	2.4	3.9	3.8	48	56	12	18	5	2	6	8	5					
Subtotal	34.3	43.2	41.5	524	611	95	98	73	77	102	94	72					
Civil:																	
Private Civil	26.7	28.1	23.6	340	347	49	53	53	53	41	42	56					
Diversity	(16.7)	(11.5)	(11.8)	(139)	(174)	(19)	(23)	(23)	(27)	(27)	(20)	(35)					
Federal question	(10.0)	(16.6)	(11.8)	(201)	(173)	(30)	(30)	(30)	(26)	(14)	(22)	(21)					
U.S. Civil	9.0	8.1	7.2	99	106	19	10	24	13	5	16	19					
Tax	4.8	4.9	5.4	60	79	4	16	15	10	11	13	10					
Bankruptcy	1.9	1.8	1.4	21	20	1	4	1	4	3	3	4					
N.L.R.B.	6.7	4.2	3.9	50	58	3	10	7	8	13	3	14					
Other agency	3.3	1.3	2.0	14	29	0	5	4	6	3	4	7					
Civil rights	7.1	4.5	7.3	58	108	12	22	14	10	19	16	15					
Admiralty	3.3	0.7	2.3	8	34	5	1	5	4	8	4	7					
School	2.4	3.2	4.7	37	69	11	15	15	13	7	3	5					
Social security	0.5	3.2	0.7	11	11	0	1	4	0	3	2	1					
Subtotal	65.7	56.8	58.5	687	861	104	137	142	121	113	106	138					
Grand total	100.0	100.0	100.0	1211	1472	199	235	215	198	215	200	210					

Legend.—Column (a) Monthly percentage Makeup of the new filings.

(b) The overall percentage in fiscal year 1971 compared with current overall percentage in fiscal year 1972.

(c) The numerical cumulative average in fiscal year 1971 for comparison with (d).

(d) The cumulative total for fiscal year 1972.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., February 7, 1972.

HON. SPIRO T. AGNEW,
President, U.S. Senate,
Washington, D.C.

DEAR MR. PRESIDENT: Pursuant to an action of the Judicial Conference of the United States, taken at its meeting on October 28 and 29, 1971, authorizing its Committee on the Budget to suggest appropriate legislation on the subject of providing for legal assistants in the Courts of Appeals of the United States, the attached draft bill as approved by that Committee is transmitted herewith for appropriate referral and the consideration of the 92nd Congress.

The purpose of the draft bill is to enable the Judicial Conference to authorize Courts of Appeals to appoint legal assistants to the court who would have sufficient professional experience and legal background to qualify such attorneys to perform the function of making the preliminary examination of all matters filed with the court; identify the issues raised; distinguish these substantial issues requiring more extended review by the court from insubstantial cases requiring less deliberation; settling preliminary procedural matters incident to appeals which now divert the time of judges away from their substantial tasks; and otherwise performing screening procedures necessary to expedite the task of the judges in reaching the substance of the matters presented to the court.

It is anticipated that such legal assistants would receive salaries commensurate with the high demands of their legal duties and with the experience and scholastic qualifications which would be imposed. Such officers would perform these screening services for the entire court and are to be distinguished from law clerks who are on the personal staff of individual judges. The latter are usually newly graduated law students without prior experience in law practice who spend a brief tenure, usually a year, with the individual judge to perform research. Legal assistants, on the other hand, would be permanent staff attorneys to the entire court with higher qualification standards necessary to the duties which they would perform.

The necessity of appointing staff attorneys as legal assistants to the court is evidence in large measure by the magnitude of judicial business faced by the courts of appeals, especially those with the highest volume of filings. Overall since 1961, the appeal filings in the eleven judicial circuits have increased by 204%. The volume since 1968 alone has increased 51%. Though the dispositional rate of the courts has been constant, the overall increase in the *pending* caseload is 289% greater than fiscal year 1961.

The request for the assistance of staff attorneys to perform the function of preliminary processing of matters filed with the court originated with the Chief Judge of the Court of Appeals for the Fifth Circuit. That court has ranked first in filings among the eleven judicial circuits and covers a vast geographical territory from Texas to Florida. The Fifth Circuit first demonstrated to the Conference an urgent need for legal assistants to this court who could handle the preliminary processing of matters submitted to the court and reduce the valuable time of its 15 active and 4 senior judges which can be more wisely deployed in deciding the merits of the litigation before them.

It might be noted that under the provisions of this draft bill, prior approval of the Judicial Conference is required before any such position of judicial assistant is established. (We would anticipate their limited use at this time only in courts of appeals having the greatest case volume.) The legal assistants will be appointed by and be removable by the court itself. Under the provisions of Section 604(a) (5), the Director of the Administrative Office would set the salaries and qualifications of these employees with the approval of the Judicial Conference. The exact range of salaries would presumably be a subject of a reference in the Judicial Appropriation Act.

It seems clear without express mention that these new officers could be subject to the usual benefits of federal employment such as retirement, health and life insurance benefits, and the like as well as specific provisions dealing with salaries administratively fixed (see 5 U.S.C. 5307).

Representatives of this office will be pleased to provide additional information that is necessary.

Sincerely,

ROWLAND F. KIRKS, *Director.*

A BILL To provide for the appointment of legal assistants in the Courts of Appeals of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Chapter 47 of title 28, United States Code, is amended by adding the following new section:

“§714. Legal assistants.

“(a) A court of appeals may appoint necessary legal assistants to positions authorized by the Judicial Conference of the United States who shall be subject to removal by the court. Such legal assistants shall perform such duties as the court shall determine involving the preliminary processing of matters filed in such court.

“(b) The compensation of legal assistants shall be fixed pursuant to section 604(a)(5) of this title, and the approval of the Judicial Conference of the United States shall be required prior to the establishment of each such position.”

SEC. 2. The analysis of Chapter 47 is amended by adding immediately following, “713. Criers, bailiffs and messengers.” the following new material:

“714. Legal assistants.”

PROJECTED WORKLOAD PER ACTIVE JUDGE ON BASIS OF 60 PERCENT SUMMARY II's, FISCAL YEAR 1972-75

	1972	1973	1749	1975
I. Summary calendared cases:				
(a) Opinions or dispositions as initiating judge.....	71	78	84	92
(b) Participations in opinions or dispositions of other panel members.....	142	156	168	184
(c) Subtotal summary calendared cases.....	213	234	252	276
II. Orally argued cases:				
(a) Opinion or disposition as writing judge.....	47	52	53	61
(b) Participations in opinions or dispositions of other panel members.....	94	104	112	122
(c) Subtotal oral argument cases.....	141	156	168	183
III. School cases:				
(a) Opinion or disposition as writing judge.....	10	11	12	13
(b) Participations in opinions or dispositions of other panel members.....	20	22	24	26
(c) Subtotal school cases.....	30	33	36	39
IV. Total opinions.....	128	141	152	166
V. Total participations.....	256	282	304	332
VI. Total opinions or participations.....	384	423	456	498
VII. Administrative-interim matters.....	93	110	130	155
VIII. Total matters participated in per judge.....	477	533	586	653
IX. Weeks of court at 20 cases per week.....	7	8	8	9

SUPPLEMENT STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, U.S. COURT
OF APPEALS, FIFTH CIRCUIT, HOUSTON, TEX.

Significant figures (based on three-fourths of fiscal year 1972)

(1) New filings (percent)	+ 19. 7
(2) Summary II's:	
Cases	+ 1, 029
Percent	+ 57. 8
Equivalent (86 weeks)	¹ 17
(3) 1972 performance (cases):	
Standing panel	241
Regular calendar	447
Summary II's	1, 029
Total	1, 717
Equivalent:	
86 at 20	¹ 17
68 at 25	¹ 14
Cases closed:	
First three-fourths	2, 007
Percent	+ 30. 6
(4) Opinions (cases):	
Fiscal year 1971	1, 661
Fiscal year 1972	1, 922
Percent	15. 7

¹ Per active judge.

	Rule 21	Per curiam (percent)	Signed
Summary II	35. 4	45. 1	19. 3
Regular	15. 4	32. 5	52. 0
Total	27. 1	39. 9	33. 0

(5) PROJECTIONS FISCAL YEAR 1973-75 REVISED DOWNWARD (APPROXIMATELY 100) FROM TABLE 1 (PAGE 14)

Fiscal year	Table 1	Mar. 31, 1972
1972	2, 596	2, 486
1973	2, 794	2, 675
1974	2, 990	2, 863
1975	3, 188	3, 052

(6) PROJECTIONS ADDITIONAL DISTRICT JUDGESHIPS

	By 1975	By 1980
Fifth Circuit	+28	
Nation ¹	+50	+130

¹ Administrative Office estimate.

NUMERICAL AND PERCENTAGE MAKEUP OF DOCKET BY STATES, FISCAL YEAR 1970 AND 1971, AND PROJECTION FOR FISCAL YEAR 1972

	Fiscal year 1970		Fiscal year 1971		Fiscal year 1972 ¹	
	Number	Percent	Number	Percent	Number	Percent
Texas.....	492	28.1	596	29.2	726	29.2
Florida.....	443	25.4	502	24.6	612	24.6
Georgia.....	264	15.1	316	15.6	388	15.6
Louisiana.....	264	15.1	300	14.8	368	14.8
Alabama.....	162	9.3	181	8.9	221	8.9
Mississippi.....	114	6.5	135	6.6	164	6.6
Canal Zone and Federal Power Commission.....	9	0.5	7	0.3	7	0.3
Total.....	1,748	100.0	2,037	100.0	2,486	100.0

¹ Projected on fiscal year 1971 percentage basis and estimated 2,486 appeals in fiscal year 1972.

SECTION I—CLASSIFICATION BREAKDOWN IN NUMBERS AND PERCENTAGES

Class	Fiscal year 1969		Fiscal year 1970		Fiscal year 1971		Fiscal year 1972 (9 mos.)	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
I and II.....	218	32.7	452	38.1	652	45.7	795	60.3
III.....	265	39.7	506	42.7	622	43.5	397	30.1
IV.....	184	27.6	229	19.2	154	10.8	127	9.6
Total.....	667	100.0	1,187	100.0	1,428	100.0	1,319	100.0

SECTION II—FISCAL YEAR 1972 ONLY

Class	First half		Last half (3 months)		Overall	
	Number	Percent	Number	Percent	Number	Percent
I and II.....	540	63.5	255	54.5	795	60.3
III.....	229	26.9	168	35.9	397	30.1
IV.....	82	9.6	45	9.6	127	9.6
Total.....	851	100.0	468	100.0	1,319	100.0

SUMMARY OF CLASSIFICATION AND SUBJECT MATTER OF CASES SCREENED, JULY 1, 1970 TO JUNE 30, 1971

Subject matter	I	II	III	IV	Total	Percent of II's to total cases
Direct criminal.....	2	177	138	28	345	51.9
Habeas corpus.....		167	53	4	224	74.5
Section 2255.....	1	63	10	1	75	85.3
Civil:						
Private civil.....		126	222	75	423	29.8
U.S. civil.....		40	56	14	110	36.4
Tax.....		17	53	10	80	21.3
Bankruptcy.....		7	13	2	22	31.8
NLRB.....		20	24	6	50	40.0
Other agency.....		4	7	2	13	30.8
Civil rights.....	1	21	42	10	74	29.7
Admiralty.....		6	4	2	12	50.0
Total.....	4	648	622	154	1,428	45.4

**SUMMARY OF CLASSIFICATION AND SUBJECT MATTER OF CASES SCREENED, JULY 1, 1971 TO MARCH 31, 1972
(9 MONTHS)**

Subject matter	I	II	III	IV	Total	Percent of II's to total cases
Direct criminal.....		216	92	14	322	67.1
Habeas corpus.....		190	32	4	226	84.0
Section 2255.....		71	3	1	75	94.6
Civil:						
Private civil (division).....		77	66	23	166	46.4
Private civil (Federal).....		82	63	36	181	45.3
U.S. civil.....		32	32	15	79	40.5
Tax.....		31	28	7	66	47.0
Bankruptcy.....		12	5	1	18	66.7
NLRB.....		23	20	4	47	48.9
Social security.....		10	2	0	12	83.3
Other agency.....		6	4	7	17	35.3
Civil rights.....		32	44	13	89	36.0
Admiralty.....		13	6	2	21	61.9
Total.....		795	397	127	1,319	60.3

**COMPARISON OF NUMBER AND PERCENTAGE MAKEUP OF SUMMARY II'S FISCAL YEAR 1971 AND FISCAL YEAR
1972 (9 MONTHS)**

Subject matter	Fiscal year 1971		Fiscal year 1972 (9 months)	
	Class II's	Percent	Percent	Class II's
Direct criminal.....	179	27.5	27.2	211
Habeas corpus.....	167	25.6	23.9	190
Section 2255.....	64	9.8	8.9	76
Civil:				
Private civil (Division).....	(126)	(19.3)	9.7	77
Private civil (Federal).....	(126)	(19.3)	10.3	82
U.S. Civil.....	40	6.1	4.0	32
Tax.....	17	2.6	3.9	31
Bankruptcy.....	7	1.1	1.5	12
NLRB.....	20	3.1	2.9	23
Social security.....	(1)	0.0	1.3	10
Other agency.....	4	0.6	0.8	6
Civil rights.....	22	3.4	4.0	32
Admiralty.....	6	0.9	1.6	13
Total.....	652	100.0	100.0	795

¹ No records maintained.

SUMMARY OF WORKLOAD IN FISCAL YEAR 1973-1975 ON VARYING MAXIMUM NUMBER OF OPINIONS

	To keep current						
	1973	1974	1975	1973	1974	1975	1975
(a) Opinions per judge.....	100	105	110	115	130	140	150
(b) Total cases to be disposed of.....	1,500	1,575	1,650	1,725	1,947	2,099	2,244
(c) Summary II (55 percent).....	825	856	907	949	1,070	1,154	1,234
(d) Cases for oral argument.....	675	709	743	776	877	945	1,010
(e) Backlog ¹ :							
Fiscal year 1973.....	447	372	297	222			
Fiscal year 1974 (cumulative).....	1,046	896	746	596			
Fiscal year 1975 (cumulative).....	1,790	1,565	1,340	1,115			
(f) Weeks of court (with screening—55 percent II's).....	34	35	37	39	44	47	51
(g) Weeks of court (no screening—20 cases).....	75	79	83	86	97	105	112
(h) Weeks of court (no screening—25 cases).....	60	63	66	69	78	84	90
(j) Weeks per active judge (with screening—55 percent II's).....	6.8	7.0	7.4	7.8	8.8	9.4	10.2
(k) Weeks per active judge (no screening—20 cases).....	15.0	15.7	16.5	17.2	19.4	21.0	22.4
(m) Weeks per active judge (no screening—25 cases).....	12.0	12.6	13.2	13.8	15.6	16.8	18.0
(n) Preference cases under council priority schedule— 51.8 percent of the docket.....					1,008	1,087	1,162

¹ For each sitting by a senior or visiting judge the backlog would be reduced by approximately seven cases.

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER—FISCAL YEAR 1972

Subject matter	Monthly percent 1972 (a)	Overall percent		1971 cumulative average (c)	1972 cumulative total (d)	July	August	Sept-ber	Octo-ber	Novem-ber	Decem-ber	Janu-ary	February	March	April	May	June
		1971	1972														
		(b)															
Direct criminal.....		22.1				49	40	37	41	61	49	28	47	38			
Habeas corpus:																	
With counsel.....		5.0				8	10	10	14	17	17	13	9	26			
Without counsel.....		11.0				25	26	20	17	16	18	25	15	17			
Section 2255:																	
With counsel.....		1.2				1	4	1	3	2	2	1	1	2			
Without counsel.....		3.9				12	18	5	2	6	8	5	5	7			
Subtotal.....		43.2				95	98	73	77	102	94	72	77	90			
Civil:																	
Private civil.....		28.1				49	53	53	53	41	42	56	45	39			
Diversity.....		(11.5)				(19)	(23)	(23)	(27)	(27)	(20)	(35)	(25)	(24)			
Federal question.....		(16.6)				(30)	(30)	(30)	(26)	(14)	(22)	(21)	(20)	(15)			
U.S. civil.....		8.1				19	10	24	13	5	16	19	16	13			
Tax.....		4.9				4	16	15	10	11	13	10	10	5			
Bankruptcy.....		1.8				1	4	1	4	5	3	4	5	5			
NLRB.....		4.2				3	10	7	8	13	3	14	12	5			
Other agency.....		1.3				0	5	4	6	3	4	7	6	4			
Civil rights.....		4.5				12	22	14	10	19	16	15	14	20			
Admiralty.....		0.7				5	1	5	4	8	4	7	10	6			
School.....		3.2				11	15	15	13	7	3	5	1	3			
Social security.....						0	1	4	0	3	2	1	2	5			
Subtotal.....		56.8				104	137	142	121	113	106	138	121	105			
Grand total.....		100.0				199	235	215	198	215	200	210	198	195			

Legend.—Column:

(a) Monthly percentage makeup of the new filings.

(b) The overall percentage in fiscal year 1971 compared with current overall percentage in fiscal year 1972.

(c) The numerical cumulative average in fiscal year 1971 for comparison with (d).

(d) The cumulative total for fiscal year 1972.

MARCH 2, 1972, OMNIBUS 4-YEAR DISTRICT JUDGESHIP BILL—FIFTH CIRCUIT

District	Alabama	Florida	Georgia	Louisiana	Mississippi	Texas
Northern.....	1	0	3		1	3
Southern.....	1	2	1		0	4
Eastern.....				2		3
Western.....				2		3
Middle.....	1	3	(1)			
Totals.....	3	5	4	4	1	11
Grand total.....						28

EN BANCS

The following table shows the number of petitions for hearing and rehearing en banc filed during the first nine months of this fiscal year, the number denied and granted, with and without a poll:

	(Fiscal year 1972— 9 months) July 1, 1971–Mar. 31, 1972
Pending as of July 1, 1971.....	18
Total petitions for rehearing en banc filed.....	132
Total suggestions for hearing en banc filed.....	8
On court's own motion.....	3
Total.....	143
Total petitions and suggestions.....	161
Denied:	
With poll vote.....	—18
Without poll vote.....	—120
Total.....	—138
Granted: ¹	
On motion of parties.....	—3
On court's own motion.....	—3
Total.....	—6
	—144
Total pending as of Mar. 31, 1972.....	17

¹ Of the 6 en bancs granted, 1 was granted with oral argument and 5 granted without oral argument.

		Projected workload based on 9 month figures	Projected workload to keep current based on April 1972, revised figures and on 55 percent II's		
		1972	1973	1974	1975
I.	Summary calendared cases:				
	(a) Opinions or dispositions as initiating judge.....	68	71	77	82
	(b) Participations in opinions or dispositions of other panel members.....	136	142	154	164
	(c) Subtotal summary calendared cases.....	204	213	231	246
II.	Orally argued cases:				
	(a) Opinion or disposition as writing judge.....	47	59	63	68
	(b) Participations in opinions or dispositions of other panel members.....	94	118	126	136
	(c) Subtotal oral argument cases.....	141	177	189	204
III.	School cases:				
	(a) Opinion or disposition as writing judge.....	5	6	7	8
	(b) Participations in opinions or dispositions of other panel members.....	10	12	14	16
	(c) Subtotal school cases.....	15	18	21	24
IV.	Total opinions.....	120	136	147	158
V.	Total participations.....	240	272	294	316
VI.	Total opinions or participations.....	360	408	446	474
VII.	Administrative-interim matters.....	93	110	130	155
VIII.	Total matters participated in per judge.....	453	518	571	629
IX.	Weeks of court at 20 cases per week.....	7	8.8	9.4	10.2

APPENDIX "B"

TESTIMONY AND PREPARED STATEMENT OF
JOHN R. BROWN, CHIEF JUDGE
U.S. COURT OF APPEALS
FIFTH CIRCUIT
HOUSTON, TEXAS

[Given to Subcommittee No. 5 of the Committee on the
Judiciary of the United States House of Representatives,
in Hearings held on June 21, 1971 on the Commission on
the Revision of the Judicial Circuits.]

COMMISSION ON REVISION OF JUDICIAL CIRCUITS

THURSDAY, JUNE 24, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 5 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Emanuel Celler (chairman) presiding.

Present: Representatives Celler, Brooks, Hungate, Mikva, Poff, Hutchinson, and McClory.

Also Present: Benjamin L. Zelenko, general counsel; and Thomas E. Mooney, associate counsel.

The CHAIRMAN. The hearing will come to order.

I recognize the gentleman from Texas, Mr. Brooks.

Mr. BROOKS. Mr. Chairman, it is my particular pleasure to introduce Hon. John R. Brown, the chief judge of the Fifth Circuit, U.S. Court of Appeals.

Judge Brown has had a long and distinguished career as a practicing attorney and as a jurist. He was appointed to the Fifth Circuit Court of Appeals in September 1955 and became chief judge in July 1967.

Judge Brown enjoys one of the finest reputations among his fellow colleagues on the bench and the practicing bar as a jurist who maintains a continuing interest in assuring that decisions emanating from the Federal courts are prompt, just, and responsive to the needs of our times. As chief judge of the largest constitutional court in the United States, Judge Brown has an obvious interest in improving court procedures and court administration. I think we are most fortunate to have him here as a witness today.

The CHAIRMAN. Judge Brown, you have been here before. You have made a very profound impression upon the members. We are very happy to have you here again to give us your views on this very important piece of legislation. We will be glad to hear from you.

STATEMENT OF HON. JOHN R. BROWN, CHIEF JUDGE, U.S. COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT

Judge BROWN. Thank you, Mr. Chairman. I appreciate very much the courtesy that you have shown to me and the privilege of appearing once again before this committee. I must thank my friend, Congressman Brooks, for that nice introduction. He is now about to be something more than a friend. It appears that he is about to become my Congressman, as well.

The CHAIRMAN. Good.

Judge BROWN. So we hope he will do as well for us as a Congressman as he has done as a friend, and as a friend of the judiciary.

Mr. Chairman, as you know, I have prepared a rather detailed statement. I will say again if I had more staff and more time perhaps it would be half as long or maybe a third as long, but when you have to work under my pressures it just gets to be pretty long. I don't think there is any point at all in my reading it or trying to restate it. It is all there. I have tried to document it. I have a few comments I would like to make which I think summarize my views.

The CHAIRMAN. We will be very glad to place your complete statement in the record and you may make any comments you wish.

(Judge Brown's prepared statement follows:)

STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, U.S. COURT OF APPEALS, FIFTH CIRCUIT

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I am John R. Brown of Houston, Texas. I have been on the Fifth Circuit Court of Appeals since September of 1955. I am Chief Judge and have been since July 17, 1967. But as I previously stated to various committees of the Congress before becoming Chief Judge I had a great deal of experience in Court administration because of the work delegated to me by my predecessors Chief Judges Tuttle, Rives and Hutcheson. The Fifth Circuit, as all know with fifteen authorized active Judges, is the largest constitutional Court in the United States. It is largest also in terms of population of its constituent states (Alabama,

Florida, Georgia, Louisiana, Mississippi, and Texas), in the number of cases filed, the number of cases disposed of, and the number of opinions published. Consequently, the Circuit has every kind of problem in double measure that Federal Appellate Courts could have. But the Court has not allowed these staggering burdens to overwhelm it. Through the diligent, resourceful, imaginative efforts of conscientious Judges—who know no limitations on energy—we have adopted innovative systems that have increased our output enabling us so far to keep abreast of this load. But even with these new practices—which will be further extended by our experimental standing panel procedure—we have to recognize with the Court at its present size (fifteen active and three energetic Senior Judges) that something has to happen by FY 1975.

FIFTEEN JUDGESHIPS MAXIMUM

Although there are some internal differences, the Judicial Council of the Fifth Circuit after careful consideration concluded unanimously that the Court should not have more than fifteen active Judges.

Inevitably, this means that on current exponential projections for FY 1972–1980 somehow the Circuit has to be split.

NEED FOR THE COMMISSION

Although, for reasons which I later discuss, I think H.R. 7378 is too narrowly constructed, the policy behind this proposed method is sound, and I unhesitatingly endorse it. As a member of the Judicial Conference, I voted for this proposal although specific legislation was not before us. I am confident that is the sentiment of the Judicial Council of the Fifth Circuit.

I am also of the clear view that to achieve the objective of a reasonably early determination on Circuit lines, it is essential that in the Commission's report to the Congress, the definitive part of the report should be confined to the proposed Circuit lines as recommended by the Commission. This will enable the recommendations to be carried into effect within the times prescribed unless, as is provided, there is rejection or disapproval. But the Commission's report should, in my judgment, have a separate section dealing with the investigation and conclusions of the Commission on those factors which inescapably have a significant, if not decisive, bearing on Circuit line-drawing.

DEFICIENCIES IN H.R. 7378

My criticism of the proposal is based on (i) the mission assigned and (ii) the scope of the Commission's recommendation.

The bill ordains that the function of the Commission:

"Shall be to study the present division of the United States into the several judicial circuits, and to recommend * * * such changes as may be most appropriate for the expeditious and effective disposition of judicial business." (Page 1, L. 4–9).

The scope of its recommendations is likewise restricted in a linear geographical way:

"The recommendations of the Commission with respect to the geographical reorganization of the Circuits or such parts thereof not specifically disapproved * * * shall take effect * * * at the stated times." (Page 4, L. 17–21)

Although the Bill (§ 5, Page 4, L. 4–11) authorizes the Commission to obtain information from other departments and agencies, everything within the ordination of the Commission's role and the scope of its recommendations points in the single direction of Circuit lines. Obviously, the Bill recognizes that some data is needed—perhaps largely demographic or Court docket-filing and disposition statistics—but the whole emphasis is on the restrictive, linear problem of drawing lines.

It is here that I am of the strong view that simply splitting Circuits, redrafting Circuit lines, is no solution at all. And if it is a solution, it is but a momentary one in terms of a year or two. Worse, the problem, unsolved, will recur as population and the resulting judicial business increases. A new Commission will be needed in 1975, another in 1980.

CIRCUIT LINE DRAWING ALONE IS SUPERFICIAL

To me the shortcoming of this bill is that merely redrawing Circuit lines is no solution at all. More important, the lines can hardly be drawn as an effective

solution for the short range future (10-20 years) without the consideration of several decisive factors. First, no rearrangement or realignment of the Circuits can avoid the need for judgepower, since the needed judgepower depends on the business, not artificial state or Circuit lines. Second, lines cannot be drawn that will adequately care for the short range future without a careful analysis of the role of the intermediate courts of appeals in the federal system. In the light of frightening projections that must reckon with such problems as (i) the appeal as a matter of right in every civil and criminal case no matter how meritorious and (ii) the reduction in diversity and other jurisdiction and the like. Once the role or mission of the intermediate appellate federal court system is determined, the Circuit lines cannot intelligently be drawn apart from some understanding of just what it is. Circuit Judges, singly and collectively as a Court, can reasonably be expected to perform. This brings into the inquiry the extent to which the problem is too much the product of traditional practices and, on the other hand, the extent to which much can be alleviated and often overcome by imaginative innovations. This borders on the earlier problem of the role of the Court of Appeals and the extent to which we can continue the luxury of the traditional oral argument in nearly every case.

Based to a great extent on the vast experience of the Fifth Circuit, I undertake in the following to demonstrate in more detail the basis for these concerns.

BUSINESS NOT CIRCUIT LINES DETERMINES JUDGESHIPS

The superficiality of Circuit line-drawing as a solution is illustrated by the predicament of the Fifth Circuit. Based upon experience-proved projections, the work ahead for the Fifth Circuit on an annual basis FY 1971-1975 with a forecast for 1980 is as follows:

TABLE 1.—PROJECTION OF FILINGS, FISCAL YEAR 1971-75 PER SHAFROTH 1970 SURVEY AND 5TH CIRCUIT REVISION

	1970 Shafroth survey ¹	January 1971 upward revision 5th circuit ²	Upward revision percentage increase
Fiscal year:			
1971.....	1,852	2,129	+ 19.2
1972.....	2,006	2,304	+ 8.2
1973.....	2,159	2,483	+ 7.6
1974.....	2,311	2,655	+ 7.0
1975.....	2,464	2,831	+ 6.6
Cumulative increase, fiscal year 1970-75.....			57.9
			National (all circuits)
1980 ³		4,513	34,881

¹ The 1st survey was in 1967, survey of U.S. Courts of Appeals, 1967, 42 FRD 243 et seq. Within a year the projections through 1975 had to be revised and within just 2 more years, the 1970 survey again revises them substantially upward.

² Upward revision of Shafroth based on actual experience of Shafroth deficiency. Cross appeals and multiple parties eliminated. The forecasts for fiscal year 1972-75 are undoubtedly on the low side since the annual increase for each of these years is calculated on the deficiency of Shafroth projections for fiscal year 1971 (14.9 percent). The court's actual experience showed yearly gains—1968-71 of 13 percent, 11 percent, 20 percent, and 19.2 percent respectively. These average out to approximately 15.5 percent.

³ Fiscal year 1980 projections based on 250 percent increase in 5th circuit fiscal year 1950-70 and 199 percent national increase as reflected by table 2 A.O. 1970 report (cross appeals and multiple parties excluded).

Thus, for example, in FY 1972 we will have 2,304 cases (see Table 1). If the six states (see map page 12) were divided 3 and 3, 8 of the Judges would end up with 144 filings per Judge and the other 7 with 164 per Judge.¹ This is in

¹ Recognizing the sometime unreliability of case filings per judgeship these illustrative projections for FY 1973 and 1974 are more than borne out by the recommendations of the Subcommittee on Judicial Statistics of the Court Administration Committee of the Judicial Conference which either has been or shortly will be brought to this Committee's attention through other witnesses. See page 4 of Judge Dunaway's report of March 19, 1971 and the table, page 2 of the A.O.'s Statistical Study "Judgeship Needs in the United States Court of Appeals" February 1971 in which seven additional judgeships are recommended for the Fifth Circuit between now and FY 1975:

contrast to the national average of FY 1970 of 120 cases per Judge.² And in FY 1974 with 2,655 filings the division would be 166 and 189 cases per Judge.

TABLE 2

	Present number	New judgeships statistically justified per circuit	New total
Circuit:			
1st.....	3	1	4
2d.....	9	5	14
3d.....	9	1	10
4th.....	7	1	8
5th.....	15	7	22
6th.....	9	1	10
7th.....	8	1	9
8th.....	8	0	8
9th.....	13	5	18
10th.....	7	1	8
Total.....		23	111

Nor would a series of splits within the Fifth Circuit be of any real help. The problem is posed, of course, because of the East and West anchor states, Florida and Texas, which have 53.7% of our business plus the adjacent states of Georgia and Louisiana making up another 30.4%.³ Based on FY 1970 figures combining Florida (443) with its 3 Judges and Georgia (264) with its 2 Judges for a total of 707 case filings and 5 Judges to produce a caseload of 140 would help none. On the other end, combining Texas (492) with its 4 Judges and Louisiana (264) with its 2 Judges for a total of 756 and 6 Judges would momentarily reduce the caseload only slightly.

TABLE 3.—ORIGIN OF FILINGS BY STATE

State	1967-68	1968-69	1969-70	Percent increase, fiscal year 1970
Texas.....	354	412	492	39
Florida.....	343	350	443	29
Georgia.....	215	194	264	23
Louisiana.....	165	213	264	60
Alabama.....	129	128	162	17
Mississippi.....	82	111	114	29

NOTES

Fiscal year 1971 will shortly close. We are positive that the ratios run the same, but we are not able to extrapolate the figures because much of the data source was destroyed in the fire in our clerk's office in January 1971, and the reconstruction by other means is arduous.

As the detailed charts show, on 8 different statistical projections the 5th circuit's needs average 8 and run from a low of 5 to a high of 10 more judgeships. See table 2, p. 9.

A Circuit split, therefore, within the states of the Fifth Circuit will offer no help. The business is still there. It takes added judgeships to handle or it requires extraordinary innovation with some, but not as many, added judgeships.

Nor is it going to be any help to the Fifth Circuit or its Judges to rearrange the Circuit by adding one or more states of the Fifth Circuit to one or more of the present adjacent Circuits—the Fourth, the Sixth, the Eighth, or the Tenth.

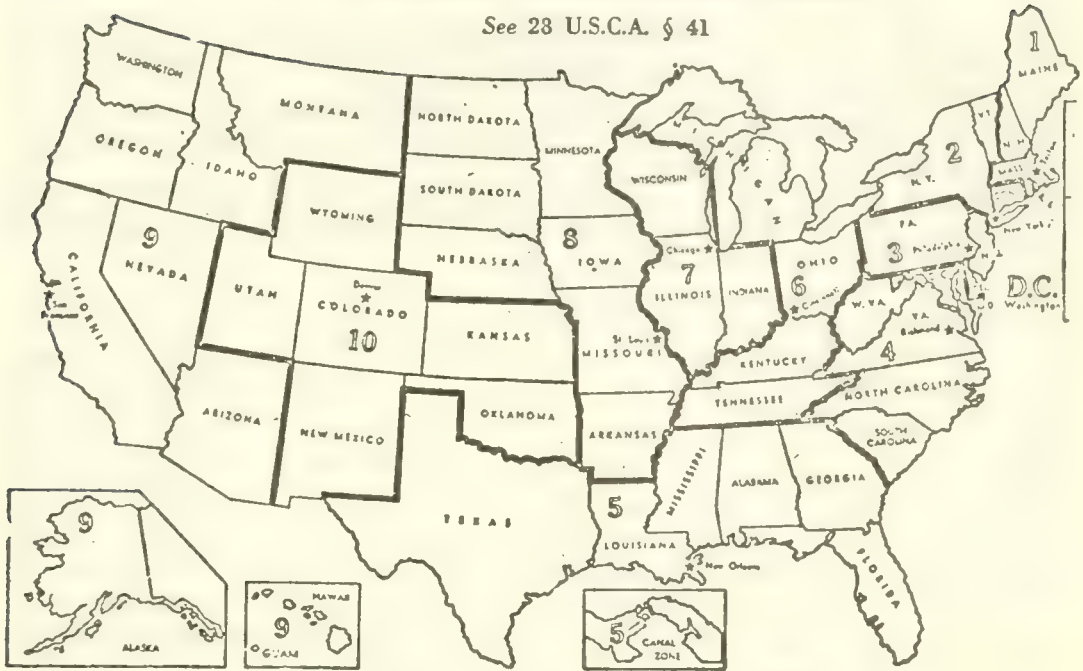
The problem is readily seen from the map of the present Circuit lines:

² The origin of the Fifth Circuit business is shown by the filings by states for the last three years.

³ See Table 2, Sheet II-4 and Table 3, Sheet II-13, Report of the Director, Administrative Office 1970.

Since the Fifth Circuit figures in Table 1, page 8 above exclude multiple and cross appeals which are included in the Administrative Office tables cited, the 120 figure should be reduced.

See 28 U.S.C.A. § 41



AMENDED TABLE 3
ORIGIN OF FILINGS BY STATE

State	Fiscal year 1968	Fiscal year 1969	Fiscal year 1970	Percent increase, Fiscal year 1970 over 1968
Texas	354	412	492	39
Florida	343	390	443	29
Georgia	215	194	264	23
Louisiana	165	213	264	70
Alabama	139	128	162	17
Mississippi	82	111	114	39

PROJECTIONS, 1971-75 ON BASIS OF ANNUAL INCREASE OF 15.0 PERCENT

State	Fiscal year—				
	1971 ¹	1972	1973	1974	1975
Texas.....	565	650	748	860	989
Florida.....	510	587	674	775	891
Georgia.....	304	350	402	463	532
Louisiana.....	304	350	402	463	532
Alabama.....	186	214	246	284	327
Mississippi.....	131	151	174	200	230

¹ Actual figures unavailable due to fire in clerk's office January 1971.

For example, if Georgia were added to the Fourth Circuit this would bring 264 more cases to the 1,166 filed in FY 1970 in the Fourth Circuit of seven Judges. The result would be a caseload of 158. With but two active Judges in Georgia, they would get no help from the Fourth Circuit's redistribution of its load and, conversely, the Fourth Circuit would statistically get no help from the Georgia Judges. It gets no better if one thinks of lumping Georgia (264) and Florida (443) with its three Judges into the Fourth Circuit (1,166). With a result of 156 there would be no gain either way except, of course, the Fourth Circuit would then become a Court of 12 Judges and much added territory.

On the same analysis adding Georgia (264) to the Sixth Circuit (911) would bring that Court's load to 1,175. There would be but a very slight gain for the Georgia Judges which would soon be wiped out as business increases. The same

would be true if Mississippi and Alabama with their 276 cases were added to the Sixth.

To tie Texas (492) and Louisiana (264) onto the Eighth Circuit (589) would give slight, temporary relief. And the slight gain would be even less in tying Texas (492) and Louisiana (264) onto the Tenth Circuit (743).

Thus on the figures of a year ago (FY 1970) there would be no gain in the most probable of intra-Circuit splits and only slight if any gains by partial adhesions to existing adjacent Circuits.

But that is not all. For on the projections (see Table 1) there is a marked increase each year over the preceding year in percentage and the resulting case filing per fifteen active judgeships:

TABLE 4

	Annual percentage increase	Caseload per judge
Fiscal year:		
1971.....	19.2	142
1972.....	8.2	153
1973.....	7.6	165
1974.....	7.0	171
1975.....	6.6	189
Cumulative, 1975 over 1970.....	57.9	

These caseload increases from 153 next year (FY 1972) to 189 in FY 1975 wipe out any possible gains by conceivable practical adhesions.

Most important, this analysis shows that drawing Circuit lines is not a solution at all. No matter how drawn, no matter how we are paired or aggregated, no matter what adhesions are made to existing or newly created Circuits, the judicial business in the states now comprising the Fifth Circuit is and will be such that the existing judgepower cannot possibly handle it. We must therefore find some other solutions.

WHERE IS THE MAGIC IN THE NUMBER 9?

One quick simple solution is, of course, to forecast the growth in judicial business against the estimated acceptable output per judgeship and then aggregate contiguous states to form a Court having not more than 9 Judges. This would be on the assumption that there is a validity to the oft repeated statement that a Court of more than 9 Judges cannot work efficiently.

Among my own colleagues on the Fifth Circuit there are some that feel this way. Despite the added problems from size, experience of the Fifth Circuit demonstrates that we are and have been a Court of remarkable productivity. We are now officially a Court of fifteen active Judges, but we have long been a Court exceeding 9 judgeships. Beginning with the very capable leadership of our then Chief Judge Elbert P. Tuttle we followed the practice of using visiting Judges—both District and out-of-Circuit Judges plus our own energetic Senior Circuit Judges. This produced a Court of equivalent judgeships as follows:

TABLE 5

	Total court weeks	Available active 5th cir- cuit judges	Judge, weeks from visiting Judges	Equivalent judgeships
Fiscal year:				
1965.....	30	7	25	10
1966.....	39	9	33	13
1967.....	45	12	33	16
1968.....	48	13	35	17
1969.....	46	12	50	19

If there ever was a case in which the pudding's proof is in the eating, then our output demonstrates that we did make it work and work effectively. Later I discuss this further in connection with the development of output standards of productivity by new procedures and innovations. It is sufficient here to say that in every year since 1966 the output has exceeded the total input for the

previous year, and in the short course of the last three years active Judges have increased their output by 38% and the Court as a whole increased by 32% in a year and a half, and for the past year over the previous one by 25%.

Of course, I do not minimize the problems, including the burden that rests upon each of the Judges not only in case participation and opinion-writing but in keeping abreast of the flood of opinions that the Court is handing down (over 1,600 this year). All would like a Court of 9 as an ideal size. But the simple fact is that for the federal system this is a goal that can hardly be attained. And if it is attained there will be such a proliferation of Circuits that an even more impossible burden will be placed upon the Supreme Court of the United States in its very important role of "policing" the cases of great importance coming from the Circuits.

More important, even in using the 1970 revised Shafroth projections (which are already on the low side), it is certain that by FY 1975 at least 5 of the Circuits will require judgeships in excess of 9. I attach Appendix 1. This schedule measures output in terms of average caseload per judgeship which at the time the table was prepared (1970) was approximately 96. On that basis a nine-man Court would handle 864 cases. The projections for added Judges needed in FY 1972 over 1970 is shown in column (e). For FY 1975 the projections are in columns (f) through (j). As shown in column (j) there will then be five Circuits requiring more than 9 Judges: Second, Fourth, Fifth, Seventh, Ninth.

While the total new judgeships forecast in the statistical study by the Conference Committee is 23, rather than 42 as in my table for FY 1975, it is interesting to see that this much more elaborate analysis on variable factors covers several of the same Circuits (see Table 2) :

TABLE 6.—*Required total judgeships, 1975*

Circuit:

Second	14
Third	10
Fifth	22
Sixth	10
Ninth	18
Total	74

With 74 judgeships needed for these 5 Courts, this means that restructuring down to 9 judgeships per Court would call for at least 3 new Circuits to bring the total up to 14. With 13,801 cases predicted for FY 1975 for all Circuits in Shafroth (1970 Rev.), and the FY 1980 projection for all Circuits of 34,881 cases (see Table 1), this means that unless there is a radical revision in the role of the Courts of Appeals within the short five-year period from 1975-80 the 120 recommended judgeships will have to increase to 320. Applying the ideal goal of a nine-man Court we would have 35 Circuits. The prospect of 35 Courts of Appeals in terms of the capacity of the Supreme Court effectively to give consistency to the body of controlling federal law is staggering. Worse, the staggering burden is augmented by the fact that the great majority of such new Courts would be Federal Courts of Appeals for a single state with all of the parochialism that would bring. The federalizing influence, so essential to the political and social structure of the United States, would be severely undermined.

Of course, I am not arguing here that Courts should expand to the sizes indicated even in 1975 by Appendix 1 and the statistical studies of the Administrative Office (see Table 2). We will reach a working limit. Rather the importance of this is to demonstrate again that it is the judicial business flowing into the judicial system which determines the need, not the geographical or the momentary arrangement of those judgeships in one or the other Circuit.

It is positive proof that those who are charged with the responsibility of recommending Circuit lines must not approach it on any supposed idyllic nine-man Court. That means, therefore in the most direct way, this Commission ought to try to ascertain what is the maximum size of a Court of Appeals that is manageable. It has a rich reservoir of material in the Ninth Circuit and the Fifth Circuit on which to make objective judgments. And once the effective use of visiting Judges, as employed in the Second Circuit, is analyzed in terms of the real total judgepower of such Court for a given year, further helpful data will result. Perhaps more important, this quest for the magic nine compels us to recognize that we must stop, look and listen to determine how long we can go on with the Courts of Appeals having their present role.

THE ORIGIN OF THE BUSINESS

Up to now—including the very penetrating Statistical Study made by the Conference Committee on Judicial Statistics (see Table 2 above)—projections for judgeship needs for Court of Appeals are always in terms of the business of those Courts. Every projection is based upon the input. Never has there been any inquiry in terms of the real source of the input—the District Courts from which the great bulk of appeals come. As the 1970 Report of the Director pointed out “the 1970 increase in case filings [in the District Courts] was the steepest case-load jump for any year of the last decade. A total of 127,280 civil and criminal actions were commenced, 13% more than fiscal year 1969.” With continuing increase in population and general business, the Fifth Circuit has to reckon with the fact that its six states, comprising 12% of the states, in FY 1970 produced 19,536 of the civil cases filed or 22% out of the Nation's total of 87,321 and 10,212 criminal cases or 26% out of the Nation's total of 39,959 (see Table C 1 and D 1, A.O. Rep.). The growth in judicial business within the states of the Fifth Circuit is reflected by the recent addition of 16 district judgeships under the Omnibus Judgeship Bill.

Undoubtedly the Commission would—and under the structure of the Bill as presently drafted could—investigate and analyze carefully this origin of business factor. But once again, any such study and the projections which are bound to come from it—especially in the light of current experience in the disproportionate increase in the number of appeals—brings the Commission back again to the basic question of the role which should be committed to the Federal intermediate court of appeals. That could manifest itself in many ways, two of which are discussed in greater detail—(i) reducing federal jurisdiction in certain areas (ii) abandoning appeal as a matter of right with discretionary certiorari-type review in a significant number and type of cases.

DISPROPORTIONATE INCREASE IN APPEALS TO TRIALS

One of the significant factors bearing directly upon the exponential increase in caseloads of the Courts of Appeals is the disproportionate increase in the number of appeals over the increase in the number of trials, both civil and criminal, in the District Courts.

This was analyzed in the Shafroth (1970 Rev. Report), and for the Fifth Circuit is shown on Appendix 2 attached. As reflected, in FY 1961–1969 civil trials increased 94.7% but at the same time civil appeals increased 157.1%. More startling, however, is that of criminal cases. Somewhat surprisingly, criminal trials increased but 48.1%, but criminal appeals jumped an amazing 210.6%, and against an appeal in approximately 1 out of every 6 criminal cases in FY 1961, in FY 1968 and 1969 every third case was appealed. Undoubtedly much of this is due to the Criminal Justice Act which, with its essential and commendable objective of affording counsel to all defendants, encourages appeals some of which have little merit. But there is no indication that this will subside and from the standpoint of the professional interest of court-appointed counsel, it is increasingly evident that the appeals are taken to eliminate the possibility that in a post-conviction remedy the defendant would accuse his counsel of inadequate representation for failure to take the appeal. Of course, this tendency, already quite evident in post-conviction cases, will likewise increase now that under Amendments to the Criminal Justice Act court-appointed counsel in both the Trial and Appellate Court on a selective basis can be given limited compensation.

Once again this brings the focus back to whether a system can be tolerated which continually increases the percentage of appeals over trials.

REDUCTIONS OF CASELOAD STATUTORY CHANGES

If the Commission were statutorily charged with the duty of analyzing the role of the intermediate federal appellate courts in the light of factors including those I have discussed, it is inescapable that it would be faced with the necessity of determining what sort of statutory changes could and ought to be made. This would take two main forms. The first is the reduction in federal jurisdiction in terms of the District Courts. Perhaps most significant as current illustrations of that approach on diversity jurisdiction and two American Law Institute suggestions which commend themselves, (a) denying a citizen of the state in which the District Court is held the right to invoke diversity jurisdiction in that district, and (b) treating a foreign corporation with a permanent establishment in

a state the same as a local citizen, thus denying it the right to invoke diversity jurisdiction, either originally or on removal.

Certainly this explosive growth in federal court litigation calls for a critical examination of the place for diversity jurisdiction and the limitations to be placed on its exercise. There are undoubtedly a number of other areas representing a substantial portion of a District Court's docket which should be scrutinized carefully. One must recognize, of course, that against the hope that some jurisdiction would be reduced, it is a certainty with the continuing enactment of more and more federal regulatory legislation that the federal question jurisdiction inescapably will increase markedly.

The other principal form of statutory change would be with respect to the jurisdiction and function of the Court of Appeals. Now except for a rare bankruptcy case, a criminal case which the Court under stringent standards declares to be frivolous, and habeas cases in which certificate of probable cause is denied, the statutory structure of the United States Courts of Appeals is to afford an appeal as a matter of right in every case. That policy must be seriously questioned now in the face of the projections for FY 1975 and 1980. Probably the most useful thing would be to establish a discretionary review of a certiorari-type in significant types of cases. This may take many different forms. The diversity cases once again afford a ready example. To the diversity cases should also be added post-conviction cases under habeas corpus or § 2255 or the like. Others might include review of social security cases—almost invariably presenting nothing but a factual controversy which has already been through a review by the District Court. Much the same could be said about cases from the National Labor Relations Board, especially that great bulk of them presenting nothing but a factual controversy with no significant legal principles presented.

No Commission can realistically draw Circuit lines against the prospect of FY 1975-1980 caseloads without seriously questioning whether any such system can be tolerated, or for that matter even survive. Unless another tier of an intermediate appellate court is to be created, serious concern must be given to those areas in which the work of the Court of Appeals would be reduced by restricting its role in a number of significant areas or types of cases. Any such ultimate decision would be fraught with a good deal of controversy. The Commission, composed of distinguished people from all walks of life, with its wide resources and inquiry from all elements of the community, including the organized Bar and individual or groups of lawyers with partisan views, could undoubtedly come forward with well-founded conclusions and recommendations which would be of great assistance to the Congress in the process of enacting some or all of the recommended legislative changes.

WHAT SHOULD APPELLATE JUDGES DO?

WHAT CAN APPELLATE JUDGES DO?

WHAT SHOULD A COURT OF APPEALS DO?

Finally, in drawing Circuit lines, there has to be some sort of qualitative standard by which the Commission determines just what reasonably can be expected of a single Circuit Court. Inevitably this means examining into what Judges can and ought to do. Of course, this involves many subjective factors which are beyond measure and would be fruitless to examine. But there is sufficient experience now in a number of Appellate Courts, state and federal, by which the size and location and the geographical area of a proposed Circuit would be determined in a significant degree by the extent to which the use of new and unusual procedures would significantly increase output. These present matters can be measured on an objective basis. They also bear directly on the underlying question of the basic role or mission of the appellate court or, perhaps more accurately, just what kind and character of an appeal can we now tolerate for just the 10 years (to 1980) ahead in the face of this explosive expansion. First, to pinpoint one or two things. Is an appeal of right too much of an ideal? Where do we cut it off? How is it cut off? By express exclusion from appellate jurisdiction? Or by a discretionary review? If appealable, is it either necessary, wise or desirable to structure it on the supposition that oral argument is available in every case? To what extent should oral argument hearings be reduced or eliminated? What safeguards are necessary to assure serious review of appeals authorized by statute if handled summarily without oral argument? To what extent can Courts improve productive output by the use of standing panels? What safeguards are needed? How much rotation of panels and constituent Judges is necessary or desirable?

It seems to me that unless the Commission is simply going to confine itself to demographic data and that coming from the source of business (the District Courts), it cannot possibly set up a reasonably ideal Circuit geographic structure without it having some notion of what Judges can and ought to be able to do. Surely the inquiry leading to Circuit lines ought to start on the assumption that much has to change. And certainly it has to change in the appellate system.

OUTPUT CAPACITY REQUIRES ASSESSMENT OF NEW METHODS

Our own experience in the Fifth Circuit has made us conscious of how important *methods* are. Had we not adopted new and untried practices, we would have long ago collapsed, and instead of a Court that is virtually up-to-date, we would have had a backlog of scandalous proportions. But as our new practices pose many of the queries briefly listed above, there is certainly a place for a study in depth by the Commission on the extent to which these and other practices are significant in affecting the productive output and are worthy of nationwide use or adaption.

Our own experience in the Fifth Circuit shows why this is vital. Our case filings started to climb from 876 in 1962 to 1,347 in 1967 (see Appendix 3 attached). One of our principal weapons in keeping abreast of this increase was the use of visiting Judges and an increase in the number of courtweeks shown below:

TABLE 7

	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Visiting judges.....	33	21	27	41	1	11
Courtweeks.....	38	45	48	46	38	43

In the fall of 1968 with the prospect (later made good) of 1,489 filings that year, we recognized that we could not possibly keep abreast of this inflow unless we found some new ways. We knew we could not get enough visiting Judges. For that input (after proved reductions for cases terminated without significant judicial activity) we would have required 64 courtweeks. With but 12 active Judges this would have required (after full use of the three Senior Judges) 60 visiting Judges. We know we could not possibly obtain this number, and our experience with the use of 45 (in 1966-67) proved that it was impossible to effectively assimilate that many visiting Judges. This led us to adopt the Fifth Circuit screening procedure. This is explained fully in *Isbell Enterprises, Inc. vs. Citizens Casualty Company of New York*, 5 Cir., 1970, 431 F.2d 409, Part I, and the cited *Huth* and *Murphy* earlier opinions. By an elaborate, but still very simple system, we set up a program under which every case was judicially screened by Judges, not Law Clerks. The Court was divided into standing panels with cases assigned in strict routine rotation by the Clerk to the initiating Judges on each panel. We established three principal classes of cases, Class II being a Summary Calendar case disposed of without oral argument. For that classification we had a double unanimity rule requiring unanimity by the standing panel on classification and also on the final opinion. Those cases for oral argument were Class III (limited to 15 minutes) and Class IV (full 30 minutes). The success of this is little short of miraculous. Beginning in December of 1968 and down through the first 9 months of FY 1971, out of a total of 2,958 cases screened, 1,131 were disposed of as Summary II's without oral argument. That this covers the whole gamut of the docket is shown on Appendix 4 which breaks the figures and percentages down annually in the three categories of (1) habeas—§ 2255, (b) direct criminal appeals and (3) civil appeals.

TABLE 8.—TYPE OF CASE, NUMBER AND PERCENTAGE OF SUMMARY II CASES

	Fiscal Year 1969		Fiscal Year 1970		Fiscal Year 1971 (9 months)		Overall	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Habeas and 2255.....	56	25.7	141	31.2	163	35.3	360	31.8
Direct criminal.....	58	26.8	131	29.0	130	28.2	319	28.2
Civil.....	104	47.5	180	39.8	168	36.5	452	40.0
Total of summary II....	218		452		461		1,131	

RECAP

	Number, summary II	Total cases screened
Fiscal Year:		
1969.....	218	667
1970.....	452	1,187
1971 (9 months).....	461	1,104
Total.....	1,131	2,958

Several things are noteworthy. First, the number of Summary II's steadily increase as we gain confidence and experience. In the first six months they ran 32.7% and at the end of nine months in FY 1971 they were running 41.8%. The current weekly report shows that from January 1, 1971 to June 15, 1971, the overall percentage of Summary II's is 49.5%. Even more remarkable is the output by particular types of cases of great public importance. Our docket is made up of the four principal types of cases:

TABLE 9

	Percent
Habeas.....	15.8
§ 2255.....	5.7
Subtotal.....	21.5
Direct criminal.....	22.2
Subtotal.....	43.7
Civil.....	56.3
Total.....	100.0

Criminal cases, either direct appeal or post-conviction, comprise 43.7% of our docket. More significant, 45.4% of all direct criminal appeals, 81.7% of § 2255 and 66.9% of habeas appeals go off as Summary II's. This does not mean they are treated as frivolous or as light or flimsy cases. All are disposed of with an opinion and many are signed opinions of some complexity. But this illustrates what innovation can do. In an area now a matter of great concern in the public's demand for more and earlier finality in criminal cases, the use of this procedure eliminates all of the delay since a case goes to the panel immediately after the last brief is filed and it is not at all uncommon for an opinion affirming a conviction to be out within 30 days. This has markedly reduced the median time from the filing of the record to its ultimate disposition.

But what this system has enabled the Court to do covering the whole range of its docket is even more spectacular. In the first 18 months a case-by-case analysis proved that it increased the Court's output 32%. And in the present, single year of FY 1971 (the last month being projected) against an increase of 18% in appeals filed over FY 1970 the number of opinions has increased 25% and the closed cases 15%. This has been brought about in no small degree by the fact that in that year the number of Summary II's increased by 48%. The cases considered and determined by both regular and summary calendar increased 29% (see Appendix 5). Another analysis of the output of each active Judge over the last three years shows to a certainty that by the use of these new methods each active Judge has increased his output by 38%.

THE FIFTH CIRCUIT INNOVATES AGAIN RULE 21

As though screening were not enough, experience of about two years with the system revealed that in this great volume of appeals—many of which were on the oral argument calendar as III's and IV's—judicial consideration of them by the panel, either on the summary or regular calendar, demonstrated that no good would be served by an opinion. Consequently, on August 14, 1970, the Court adopted what it calls Rule 21 which permits a simple order of affirmance for civil and criminal cases (not reversal) and enforcement in an administrative agency case. This rule, in its operation and the necessity for it, is detailed in *NLRB vs. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F. 2d 966.

Of course, such a device must be, and is, carefully used. Scattered as we are geographically, it works well for us. At least in effect it closely parallels the practice frequently used in the Second Circuit of dismissal from the Bench.

In reaching our output of 1,600 opinions this has been significant since Rule 21 opinions for the first nine months of FY 1971 comprised 23% of the per curiams.

An appellate Court's work is principally that of deciding cases by delivering opinions. The current year will see almost 1,600 opinions published. Of these 886 (55%) are curiams (see Appendix 6). In terms of output since 1967 the Fifth Circuit has disposed of more cases in the current year than were filed in the previous year (see Appendix 7). All the while there has been a disproportionate increase in the so-called carryover of cases in the course of getting ready for calendaring (376 over 1967 in contrast to case filing increase of 1,027).

THE FIFTH'S NEWEST EXPERIMENT STANDING PANELS

Not content with these spectacular results the Fifth Circuit has again entered on an even more unique experiment. Faced with the certain projections of work which exceeded the capacity of 15 active Judges and the determination not to increase beyond 15 judgeships, the Court recognized that it was faced with a real crisis. It proposed to the Chief Justice and to the Judicial Center what it has called the Crisis Project. This we are hopeful will be supported by the appropriate agencies. To increase output in the interim the Court has just adopted a new procedure on an experimental basis (up through December 31, 1971) by which all judicial matters are assigned in strict rotation to five standing panels with that panel having complete responsibility from the beginning to the end of that case. The panel will determine whether it is to be disposed of as a Summary II without oral argument, and if argument is needed that panel will hear the case at the time and place fixed by the panel. Under this system we anticipate that in contrast to the current figure of nearly 50% Summary II's, dispositions without oral argument will run as high as 75% of the entire docket. Although this will call in FY 1972 for a substantial increase in the personal productive output of each Judge, we think we will be able to do it if we get the supporting staff help we need. We are hopeful that we will be, as we now are, substantially current with no real backlog. Each year thereafter poses new burdens, but we are hoping that it will work through FY 1973-74. For those who deplore this high percentage of Summary II decisions without oral argument, the answer is a simple one. Were we not to use the methods we have employed and the new ones being initiated we would be in an absolute state of chaos with scandalous cumulative backlogs. This is because in order to dispose of all of these cases on oral argument, we would have to have a startling number of court-weeks way beyond the capacity of our own Judges which in turn would require an impossible number of visiting Judges. This is illustrated by the following on the assumption of 30 visiting Judges with the annual and cumulative backlog resulting.

TABLE 10

	Fiscal year—			
	1972	1973	1974	1975
Cases for judicial disposition.....	1,764	1,904	2,043	2,234
Backlog from preceding year.....	20	280	780	1,440
Total cases for oral argument.....	1,784	2,184	2,823	3,674
Court weeks required (20 per week).....	84	109	142	184
Court weeks serviced by active 5th circuit judges.....	60	60	60	60
Total visiting judges required.....	72	147	246	372
Backlog (assuming 30 visiting judges available).....	280	780	1,440	2,280

Note: These impossibilities highlight why our success for fiscal year 1971 is due to our new procedures. Without screening and on oral argument only, on the same basis as this table, we would have required 76 court weeks with 48 visiting judges, an impossible attainment.

This material is put forward not to show that we do better than anyone else or that others could or should adopt our systems. Every Circuit, whether on present or future alignments, will have unique problems. I offer it in this detail to demonstrate that there is a tremendous, untapped capacity for output that Judges and Courts are not aware of until they experiment. It is of importance here because the Commission cannot really determine how many Judges and therefore how many Circuits are needed until it first ascertains what it is Judges or groups of Judges in a collective Court can do.

That my concern upon goals and methods is not simply the parochial view of a single Chief Judge from a single Circuit is proved by the comprehensive program set up by the American Bar Foundation for an in-depth analysis of the appellate process. This is done under the guidance of the Appellate Judges Conference of the Section of Judicial Administration by a Committee of which Judge James D. Hopkins of the New York Supreme Court is chairman and Professor Prentis Marshall is the project director. Operating in probably parallel concern is the Commission on Judicial Administration of which Judge Carl McGowan of the D.C. Circuit is chairman operating under the supervision of the American Bar Association with a Ford Foundation grant (see 39 Law Week 2690).

CONCLUSION

I end as I began: I am wholeheartedly in favor of the establishment of this Commission. I agree also that in its definitive recommendations on Circuit realignments and Circuit lines this must be positive and direct for submission to this Congress. But this analysis demonstrates, I believe, that the Commission cannot intelligently draw those lines without first making an in-depth study of what the role of the Court of Appeals ought to be, what we can tolerate, what we can survive under, what statutory changes should be wrought to bring the workload within reasonable capabilities, and an objective determination of what Judges and Courts reasonably ought to be expected to do and accomplish by the imaginative use of new methods and procedures.

ADDITIONAL CIRCUIT JUDGESHIPS NEEDED, 1972 AND 1975 SHAFROHT ON PROJECTIONS (UPDATED TO 1970)

(a)	96 caseload average							
	1972				1975			
	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
	Present number judge- ships (1970)	Shafroth projec- tion (1970)	Exceed 864 by—	Added judges needed, 1972 compared 1970	Shafroth projec- tion (1970)	Exceed 864 by—	Added judges needed, 1975 compared 1970	Judge- ships per circuit 9 or more
Circuit:								
2d.....	5	983	119	1	1,177	313	3	12
3d.....	8	749			874	10		
4th.....	18	1,426	562	7	1,820	956	11	19
5th.....	15	2,006	1,142	6	2,464	1,600	10	25
6th.....	8	867			981	117	1	9
7th.....	11	809			968	104	2	10
9th.....	13	1,719	855	5	2,166	1,302	10	23
10th.....	7	713			824			
District of Columbia.....	9	1,025	161	2	1,478	614	6	15
Total.....				21			42	

1 added as recommended by 1970 Shafroth report.

APPENDIX 2

PERCENTAGE INCREASE IN CIVIL AND CRIMINAL TRIALS AND INCREASE IN APPEALS, 5TH CIRCUIT, FISCAL YEARS 1961-69

Fiscal year	Number of judgeships		Total civil and criminal appeals filed	Civil trials	Civil appeals	Criminal trials	Criminal appeals
	Circuit	District					
1961.....	7	33	1,770	512	1,159	408	611
1962.....	9	45	1,975	529	1,328	422	647
1963.....	9	45	2,227	679	1,463	528	764
1964.....	9	45	2,154	818	1,418	687	736
1965.....	9	45	2,292	879	1,596	702	696
1966.....	9	45	2,478	873	1,669	664	809
1967.....	13	58	2,703	949	1,869	703	834
1968.....	13	58	2,960	1,159	2,034	820	926
1969.....	15	58	3,162	1,372	2,257	1,049	905
Percent change, 1969 over 1961.....	114.3	75.8	78.6	168.0	94.7	157.1	48.1
							210.6

Note: Beginning with 1962 the number of appeals in each year under each category have been reduced by the number disposed of by consolidation.

Source: 1970 Shafroth survey.

SUMMARY OF COURT BUSINESS (5TH CIRCUIT)

Item	Fiscal year—											
	1959-60	1960-61	1961-62	1962-63	1963-64	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
(1) Unassigned carryover from preceding year.....	192	207	263	329	420	588	825	816	762	754	754	875
(2) Carryover of cases argued but not decided.....	56	71	140	193	213	147	105	185	257	322	315	306
(3) New filings.....	584	639	717	876	1,033	1,073	1,099	1,189	1,347	1,489	1,794	2,055
Total to be disposed of during fiscal year.....	832	917	1,120	1,398	1,666	1,808	2,029	2,190	2,366	2,565	2,863	3,236
(4) Less cases closed.....	554	514	598	765	931	878	1,028	1,171	1,290	1,496	1,682	1,932
(5) Undisposed of cases.....	278	403	522	633	735	930	1,001	1,019	1,076	1,069	1,181	1,304
(6) Breakdown of undisposed of cases:												
(a) Pending under submission.....	71	140	193	213	147	105	185	257	322	315	306	382
(b) Unassigned carryover.....	207	263	329	420	588	825	816	762	754	754	875	922
(7) Percent of new filings over preceding year.....	4.7	9.4	12.1	21.5	17.6	3.2	2.4	7.5	13.2	10.6	20.5	14.7
(8) Number of weeks of court (5-day basis).....	24	25	26	31	33	30	39	45	48	46	38	43
(9) Percent carryover increase of unassigned cases to preceding carryover (item 6(b)).....	7.8	27.0	25.0	27.6	40.0	40.3	-1.1	-6.7	-0.2	0	16.0	5.4
(10) Percent carryover increase of submitted cases to preceding carryover (item 6(a)).....	26.8	97.2	37.9	10.4	-31.0	-21.9	76.2	38.9	25.3	-0.2	-0.3	24.9
(11) Percent carryover of unassigned case to total annual filings (item 3).....	35.6	41.1	46.1	48.4	57.6	76.9	74.1	65.7	56.0	50.6	48.7	44.8
(12) Average monthly filings.....	49	53	60	72	85	87	89	96	112	124	150	171
(13) Number of judges (active).....	7	7	9	9	7	7	9	12	13	12	14	15

1 Projected as of May 4, 1971.

APPENDIX 4

TYPE OF CASE—NUMBER AND PERCENTAGE OF SUMMARY II CASES

	Fiscal year 1969		Fiscal year 1970		Fiscal year 1971 (9 months)		Overall	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Habeas and 2255.....	56	25.7	141	31.2	163	35.3	360	31.8
Direct criminal.....	58	26.8	131	29.0	130	28.2	319	28.2
Civil.....	104	47.5	180	39.8	168	36.5	452	40.0
Total of summary II....	218		452		461		1,131	

RECAP

Fiscal year	Number summary II	Total cases screened
1969.....	218	667
1970.....	452	1,187
1971 (9 months).....	461	1,104
Total.....	1,131	2,958

GENERAL BUSINESS OF THE 5TH CIRCUIT (FISCAL YEARS 1970-71)

	Fiscal year 1971	Fiscal year 1970	Percent increase
New appeals.....	2,127	1,794	18
Opinions.....	1,594	1,271	25
Closed cases.....	1,932	1,682	15
Hearing calendared cases.....	860	740	16
Summary cases.....	669	452	48
Regular and summary calendar.....	1,530	1,192	29
Unready cases carried over.....	922	862	7
Percentage of new cases carried over.....	44.8	48.7	¹ -3.9
En banc petitions filed.....	99	77	29
Miscellaneous prisoner petitions.....	502	438	15

¹ Decrease.

DISPOSITIONS BY PRINTED OPINIONS, FISCAL YEARS 1965-71

	Signed opinions	Per curiam opinions	Total opinions
Fiscal year:			
1965.....	322	304	626
1966.....	355	317	672
1967.....	450	370	820
1968.....	500	353	953
1969.....	604	525	1,129
1970.....	638	633	1,271
1971.....	708	886	1,594

SUMMARY II OPINIONS

	Fiscal year—		¹ 1971
	1969	1970	
Per curiam.....	109	326	493
Signed.....	41	100	101
Total.....	150	426	594

¹ 9 months actual and projected. Since Aug. 14, 1970 rule 21 summary affirmance opinions have comprised 23 percent of per curiams (103 out of 446).

FILINGS, DISPOSITIONS AND CARRYOVER IN 5TH CIRCUIT, FISCAL YEAR 1960-71

Fiscal year:	Number of cases filed	Number of cases disposed of	Carried forward to succeeding year
1960	584	554	278
1961	639	514	403
1962	717	598	522
1963	876	765	633
1964	1,033	931	735
1965	1,073	878	930
1966	1,099	1,028	1,001
1967	1,189	1,171	1,019
1968	1,347	1,290	1,076
1969	1,489	1,496	1,069
1970	1,794	1,682	1,181
1971	2,127	1,932	1,376

19 months actual and projected.

SUPPLEMENTAL STATEMENT OF JOHN R. BROWN, CHIEF JUDGE,
U.S. COURT OF APPEALS, FIFTH CIRCUIT

I am filing this supplemental statement to my original statement and testimony of June 24, 1971, in order to supply data not then readily available on (i) the composition of the docket by categories of cases and particularly diversity, (ii) the extent to which en bancs are requested or passed upon, and (iii) to give emphasis to a factor which ought to be self-evident but which is the very life blood of our continued use of innovated procedures which have brought about such increases in productive output.

Composition of the Docket: In connection with the proposal that diversity jurisdiction be sharply curtailed, the question was asked as to the percentage of diversity cases in the filings of the Fifth Circuit. I stated approximately 10%. This turns out to be almost on the head. Until August 1970, diversity cases were lumped in with private civil cases generally. Since that date we have separate figures. I attach as Appendix 8 the Table of New Appeals Docketed by Subject Matter FY 1971 down through May 31, 1971. From this the Committee can also see the other main categories. These figures are currently kept so that we can intelligently plan our activities and can anticipate marked changes in the character, kind or volume of particular type of cases (e.g. school pupil assignment cases).

En bancs: An en banc is an essential, but sometimes awkward mechanism, for maintenance of institutional uniformity and stability in multi-judge Courts. I attach as Appendix 9 a recap showing the totals in annual periods up through January 31, 1971 and the two-month period February 1, 1971 through March 31, 1971. The reporting period begins February 1 because that is the time we instituted the practice later formalized in Federal Rules of Appellate Procedures 35. For the most recent full twelve-month reporting period (2/1/70—1/31/71) and the period February 1, 1971 to June 30, 1971 the following extract indicates the volume of these petitions, each of which has to be considered by every active member of the Court even though few of them result in a request for or the conducting of a poll and even fewer are granted:

TABLE 11

	Feb. 1, 1970 to Jan. 31, 1971	Feb. 1, 1971 to June 30, 1971
Petitions for rehearing en banc filed	138	80
Polls conducted	26	6
Denied by panel without poll	79	51
Rehearing en bancs granted	11	5

In addition to these petitions by parties, the Court has an internal procedure in which a non-panel member can request the panel to reconsider some or all of

the decisions. This goes to the entire Court for consideration, but seldom results in a poll and most often terminates with modifications eliminating the cause of concern.

Success Means People: People Mean Money: Although in my statement I stressed that the screening procedure and the standing panel procedure just adopted require substantial additional supporting personnel, this deserves further emphasis. We know that we are at the end of our rope now. And while over the last three years we have consistently improved our output, we know we will soon reach the point of maximum output *unless* we get substantial added staff. This includes extra secretaries, a third law clerk for each Judge, a well organized group of staff attorneys (paralegals) under competent supervision and with adequate secretarial and clerical assistance. All of this means money. But unless the money is forthcoming to acquire this personnel, the chaos revealed in the Tables will occur. And in terms of sheer money—to solve the problem to avoid the chaos—the cost is much less than that of installing and maintaining eight additional tenured Judges with their regular staffs. The cost of this increased productive capacity is not cheap. But if this help is not forthcoming, there is no hope that either the current pace can continue or that the new methods can be employed or such efforts would keep up with the flood.

The extent to which our innovative systems impose substantial burdens beyond that borne when matters are handled traditionally by oral argument is shown by Appendix 10A–10D. This shows for each of the Judges of the standing panels the burden of participation and opinion load based upon the filing projections for FY 1972–1975 and on the alternative hypothesis that the Summary II's will amount to 60%, 65%, 70%, and 75% of the total filings. The Judges simply cannot handle 117 opinions as projected for FY 1972 unless we get help over and above that of our existing staff and that of the Court as a whole. And FY 1973, 1974, 1975 is simply out of the question.

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER, FISCAL YEAR 1971

Subject matter	Cumulative percent prior period	Current monthly filing, percent	Current overall, percent	Total	Jul.	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	Jun.
Direct criminal.....	22.1	19.3	21.9	407	37	25	30	41	42	45	30	41	37	43	36	-----
Habeas corpus:																
With counsel.....	5.2	3.7	5.0	94	7	9	6	5	12	9	8	7	14	10	7	-----
Without counsel.....	11.2	10.7	11.1	207	9	16	20	19	20	17	19	11	26	30	20	-----
2255:																
With counsel.....	1.4	0.0	1.2	23	1	1	5	6	0	1	2	2	4	1	0	-----
Without counsel.....	4.1	3.7	4.1	76	12	6	3	9	6	7	2	10	7	7	7	-----
Subtotal.....	44.0	37.4	43.3	807	66	57	64	80	80	79	61	71	88	91	70	-----
Civil:																
Private civil.....	27.3	32.1	27.7	516	48	46	48	42	28	47	53	34	58	52	60	-----
Diversity.....						(18)	(23)	(19)	(13)	(25)	(25)	(15)	(15)	(11)	(26)	-----
Federal quest.....						(28)	(25)	(23)	(15)	(22)	(28)	(19)	(43)	(41)	(34)	-----
U.S. Civil.....	7.9	8.6	7.9	148	16	16	7	15	23	5	12	7	17	14	16	-----
Tax.....	4.9	4.3	4.8	90	11	10	5	6	8	11	7	10	8	6	8	-----
Bankruptcy.....	1.7	3.2	1.8	34	2	0	4	3	5	3	3	3	1	4	6	-----
N.L.R.B.....	4.4	2.6	4.3	79	12	5	5	1	4	8	13	3	13	10	5	-----
Other agency.....	1.0	4.3	1.4	25	5	1	-----	1	3	0	0	2	2	3	8	-----
Civil rights.....	4.8	6.4	4.9	91	9	9	8	7	6	7	0	4	17	12	12	-----
Admiralty.....	0.7	1.1	0.7	13	3	2	1	0	0	0	1	0	0	4	2	-----
School.....	3.3	0.0	3.2	59	15	17	9	5	2	2	4	2	2	1	0	-----
Subtotal.....	56.0	62.6	56.7	1,055	121	106	87	80	79	83	93	65	118	106	117	-----
Grand total.....	100.0	100.0	100.0	1,862	187	163	151	160	159	162	154	136	206	197	187	-----

	Feb. 1, 1967, to Jan. 31, 1968	Feb. 1, 1968, to Jan. 31, 1969	Feb. 1, 1969, to Jan. 31, 1970	Feb. 1, 1970, to Jan. 31, 1971	Feb. 1, 1971, to Mar. 31, 1971	Total
(1) Disposition of petitions for rehearing en banc:						
Denied:						
With poll vote.....	5	7	8	15	0	35
Without poll vote.....	42	64	66	79	16	267
Granted:						
With argument.....	2	0	0	0	0	2
Without argument.....	3	3	3	5	0	14
Total.....	52	74	77	99	16	318
Pending.....	2	4	15	50	30	30
Total.....	54	78	92	149	46	348
(2) Less: Carryover of pending petitions from prior period.....	0	2	4	15	16	16
(3) Total petitions for rehearing en banc filed.....	54	76	88	134	30	332
(4) Total petitions for hearing en banc.....	0	6	4	4	0	14
(5) Total all en banc petitions.....	54	82	92	138	30	346
(6) En banc on court's own motion:						
With argument.....	4	2	13	0	0	19
Without argument.....	0	2	5	6	0	13
(7) Total, all petitions for rehearing and/or rehearing en banc.....	227	284	335	399	88	1,333

PROJECTED WORKLOAD PER ACTIVE JUDGE UNDER STANDING PANEL ASSIGNMENT SYSTEM ON SUMMARY II'S: FISCAL YEARS 1972-75

	Basis of 60 percent				Basis of 65 percent				Basis of 70 percent				Basis of 75 percent			
	1972	1973	1974	1975	1972	1973	1974	1975	1972	1973	1974	1975	1972	1973	1974	1975
I. Summary calendared cases:																
(a) Opinions or dispositions as initiating judge.....	70	76	82	89	76	83	88	97	83	89	95	105	88	95	102	112
(b) Participations in opinions or dispositions of other panel members.....	140	152	164	178	152	166	176	194	166	178	190	210	176	190	204	224
(c) Subtotal summary calendared cases.....	210	228	246	267	228	249	264	291	249	267	285	315	264	285	306	336
II. Orally argued cases:																
(a) Opinion or disposition as writing judge.....	47	51	54	60	41	44	48	52	34	38	41	44	29	32	34	37
(b) Participations in opinions or dispositions of other panel members.....	94	102	108	120	82	88	96	104	68	76	82	88	58	64	68	74
(c) Subtotal oral argument cases ¹	141	153	162	180	123	132	144	156	102	114	123	132	87	96	102	111
III. Total opinions.....	117	127	136	149	117	127	136	149	117	127	136	149	117	127	136	149
IV. Total participations.....	234	254	272	298	243	254	272	298	234	254	272	298	234	254	272	298
V. Total opinions or participations.....	351	381	408	447	351	381	408	447	351	381	408	447	351	381	408	447
VI. Administrative-interim matters.....	93	110	130	155	93	110	130	155	93	110	130	155	93	110	130	159
VII. Total matters participated in per judge.....	444	481	538	602	444	481	538	602	444	481	538	602	444	481	538	606
VIII. Weeks of court at 20 cases per week.....	7	8	8	9	6	7	7	8	5	6	6	7	4	5	5	5

¹ Total caseload from January 1971 5th circuit updated Shafroth projection.² Each substitution of a senior judge for an active judge on a standing panel for 1 week of 20 cases per week reduces the judge's opinion writing by 7 and participations by 13.

Judge BROWN. Thank you, sir. I am in favor of this legislation. As a member of the Conference, I voted for it in principle. We did not have any specific proposed legislation before us.

I think that there is great value in a commission-type of procedure. We are told that there has been only one circuit realignment, really, in modern times and that was when the Tenth Circuit was created and it was the slow product of much hauling and tugging.

We are told—we don't know directly about these things, of course—that this is so wrapped up with political considerations, Senators envious of what circuit they are going to be in, and so on, that it might be a very difficult thing if the Congress itself undertook to try to redraw these circuit lines. So I am enthusiastic about the commission method. I also recognize that if the so-called reorganization plan type of structure is to be followed, where a report is made and the Congress either accepts it or rejects it within a stated time, that their recommendations on circuit lines would have to be very definitive.

My criticism of the bill is that it is too narrowly structured. It just assumes that you can draw lines and solve problems. I think this Commission has to be charged not only with sort of a professional concern but with an official responsibility to look at some of the deep questions that are wrapped up in this problem of caseloads and the work of the courts of appeals and that is the tenor and that is the burden of my approach here. I maintain, first, that there is really no solution at all in just a circuit split. Second, you cannot really decide what ought to be done without looking at the probable load on the court of appeals systems in terms of the next 7 or 8 years, with a view of seeing whether we can tolerate or even survive any longer under this system. That brings us to the role of the court of appeals, what should its mission be. Then next, how can anybody intelligently determine where circuit lines should be drawn unless he first knows what is it you can expect a court to do, a good court. I mean, a hardworking court. I believe I speak for everyone. We are all working hard. You cannot decide what a court can do without knowing what is it you can expect a judge to do, what is a reasonable standard. I don't mean that you should try to find in a subjective way if Judge X doesn't work as hard as he should and Judge X does better, but there are some objective ways.

Then, third and finally, you cannot possibly determine what it is a court should do or what a judge should do without knowing what it is that judges are doing now that is unusual and that has brought about a great increase in productivity.

I am going to talk about the Fifth Circuit because we are a guinea pig. There isn't a problem in the judiciary we don't have. We have it in a double dose. We could have collapsed 3 or 4 years ago. But in fact we are up to date. It is a remarkable record. We face a prospect that is staggering. We have taken some new steps I am going to tell you about that we hope will keep us abreast for a couple or three more years. Then something is going to have to give. So this is the kind of a theme I have here.

I still believe the bill is a good one, but I think any such commission must look into these basic things.

Now, let me remind you first that the Court of Appeals for the Fifth Circuit is the largest, as Mr. Brooks pointed out, with 15 active judges. Next is the Ninth Circuit with 13 judges. Our council has gone on rec-

ord formally, unanimously, against more than 15 active judges. I will say some of us were not quite as enthusiastic about it but we have a united front. We have actually been running a court of more than 19 judges when you figure the equivalent of visiting judges. When somebody says a 15-man court can't work I just say, as some of our political friends have said, "Just look at the record." What we are doing is nothing short of an amazing thing, and I am not too boastful, I hope, in saying it.

So we are a court that recognizes, first, that something is going to have to be done and, second, maybe a court realignment seems to be more or less inevitable. But it ought to be done in a way that solves the problems in some kind of a sensible way.

Why do I say a circuit split or just circuit lines is a superficial nonsolution? The Fifth Circuit again is a good illustration. We have six States: Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas. Fifty percent of our business comes from Texas on the west and Florida on the east, and the next adjacent States, Georgia and Louisiana, supply another 30 percent. As to Mississippi and Alabama, we have no real problem since these can be shifted to adjacent circuits to probably get a little help but not much.

First, let's talk about splitting the Fifth Circuit. We can cut it in two or in thirds. With 15 judges we would still end up with a caseload that is 35 percent more than the average for the whole Nation last year of about 120. We would have approximately 150 to 160 cases. If Georgia and Florida were cut off and made a new circuit their caseload would be higher than it now is and within a couple of years it would even be worse. Texas and Louisiana would gain a little bit for the first year. I gave to Mr. Zelenko a new amended table 3 which is found on page 11 which gives the filings from each of the States of the Fifth Circuit with projections to fiscal year 1975. I used the 1970 figures because that was the only way I could get a comparison with the other adjacent circuits. You can see for fiscal year 1971 we have a little difficulty on statistics because of the fire in the clerk's office which destroyed these records so that we are going to have to reconstruct them for 1971. We will do it. However, the projections are very, very conservative (an annual increase of 15.5 percent) with respect to 1972 through 1975 and you will see how much they go up. Texas and Florida will increase 150 each just for this coming year, and the moment you apply that to any of these cross-pollinations, say, to the Fourth Circuit or the Sixth Circuit or the Eighth Circuit or the Tenth Circuit it is already out of balance. So you can see that drawing of lines is no answer.

Why is that? Well, the reason is that the business is there, not only business business, but judicial business that comes from business.

The States of the Fifth Circuit comprise 12 percent of the States. We have about 15 percent of the population. We have 22 percent of the civil business of the whole country and, not to our great credit, we have 25 percent of the criminal business. So we know that as long as the business is there it is going to take judgepower.

Here, of course, you get face to face with what is it you ought to expect of a court of appeals system and of judges. Our projections are set forth in the statement. Incidentally, we have our own figures and they are hard figures. They exclude all of the water. We take out all the multiple parties. We cannot work just on the Administrative Office

records; they are a year and a half old when they get to us so they are not very useful to us for planning purposes. But we have proved year after year that our projections are right on the nose.

This year we will have 2,100 cases against a projection of 2,127 and they tell me that is pretty good. Next year we know it is going to be not less than 2,300 cases. In preparing this statement I learned that we used an additional approach which I would regard as doubtful since we just used the adjustment factor on the 1971 figures for 1972 through 1975. If experience teaches us anything, it is that in the last 4 years we have averaged each year an annual increase of 15 percent, so instead of 2,300 next year we are apt to have 2,500, and when we get to 1975—that is just the day after tomorrow—we are going to have not less than 2,800 cases and we will undoubtedly end up with about 3,000.

Incidentally, all of these projections have been reviewed by the statistical people in the Administrative Office. We have submitted them directly to the Chief Justice so that he knows of our plight. They have been found trustworthy both in the calculations and in the statistical methods used.

In 1980—and that is just a couple of weeks off, so to speak—we anticipate we will have over 4,800 cases. But the shocking thing that should bring this committee really to a point of great excitement is that for the court of appeals system as a whole there will be 34,000 cases. Now, that is against a total last year of 11,000 and it is against a total of about 13,000 on the Shafroth projections for fiscal year 1975. I am sure you have heard about the Shafroth projections. He is a tremendously able man.

Now, when you think about that you can see why I say somebody has to start looking at the problem of what do you expect of the court of appeals, not just good judgments, but can they do it.

Now, one of the things that I regard as somewhat of a myth is that no court should ever be larger than nine. I have some judges on my court who feel that way. Judge Coleman, a great friend of Senator Eastland, has said, "It is too much like a convention. It is not a court." But again we have made it work.

The CHAIRMAN. It would be like a House of Lords.

Judge BROWN. House of Lords, that is right. But now we are going to divide ourselves up into standing panels. I am going to tell you about that. We are going to divide ourselves up to see if we can't improve output even more. Any kind of a consideration of this problem, I think, will lead you to the certainty that you cannot demand the luxury of a nine-man maximum court. Again the Fifth Circuit is a good illustration of this.

I made a projection here a couple of years ago which you will find in the table in appendix 1. It shows on these projections the number of courts of appeals in 1975 that will have to have more than nine judges. I have also set forth as a table the extract from the statistical study made by and for Judge Butzner's committee (and report by Judge Duniway). That is the Subcommittee on Statistics and Procedures of the Judicial Conference which is making a study on the omnibus judgeship bill for the courts of appeals. As you remember, each 4 years the Congress and the Conference try to handle district judgeships in one omnibus bill, and then in another year following that the court of appeals. We reported that we don't want more active judges.

We are going to have to have more help. But this committee went ahead and made eight different projections to try to eliminate these aberrations that come from some of the reporting methods used, especially on habeas corpus and postconviction cases, to get the water out and to get common denominators.

On eight different projections they show that the Fifth Circuit needs seven more judges—that is 22—by 1975. Worse, it shows for the Second, Third, Sixth, and Ninth Circuits they will need more than nine judges and it runs up to 19 in the ninth circuit. If you divide the additional judges up and get an ideal of nine, you will see that even on that projection you are going to have to create three more courts of appeals. But the startling thing is if you apply these same statistical methods to the projection for 1980 you will see that we will need 320 circuit judges, and if you then want nine-judge courts you are going to have 35 courts of appeals. That means, for example, there will be a court of appeals for Texas. That is a terrible thing, not so much just for Texas but it is for the Nation because the great strength of the court of appeals system is its federalizing influence that comes from the cross-pollination of views and judges of different backgrounds and laws of different backgrounds that have this influence on a healthy, growing body of law.

California, with its 19 million or 20 million people, is going to have to have a Federal court of appeals for California pretty soon. That is another instance that makes the job so urgent that you look to see what it is you can expect of the Federal intermediate appellate system.

Change can take several forms. One is statutory relief in terms of, say, jurisdiction in the Federal district court because that is where our business comes from.

Mr. POFF. Would you care to give some examples at that point, judge?

Judge BROWN. Yes; I am going to do it right now. There are two branches of legislation involved. One would be those that go to jurisdiction of the district courts and the second group would be those that go to the nature of the review permitted in the court of appeals or otherwise in the appellate system. The first is the basic jurisdiction. We are strong for the ALI standards on diversity jurisdiction that will whittle this thing way down.

The CHAIRMAN. Might I ask at that point what is the percentage of appeals in that classification? Roughly how many appeals involve diversity cases?

Judge BROWN. Diversity runs about 10 percent in our circuit. I will have the exact figure here in a little bit when I lay my hands on it. It is about 10 percent. The civil business is approximately 60 percent of our docket but that covers U.S. civil, Government civil cases, private civil cases under Federal questions, civil rights, admiralty, tax, NLRB, administrative agencies. We keep exact figures and I am going to give to Mr. Zelenko a table that will show the breakdown month by month of the exact type of case we have so we know exactly what we are dealing with. I think we should take a lot of diversity away from the district courts.

The ALI standards really propose that you can't create false citizenship status by corporate origin, and second, that a person in the State ought not to be able to sue somebody else in the Federal court. He ought

to sue in the State court. However, you must recognize that this is not going to be too productive, too helpful, because for every one of those diversity cases we are going to lose we are going to get another dozen Federal question cases as a result of the Congress grinding out new legislation every day. A little boy says, "Why make a Federal case out of it, pops?" Well, that is all it is today. Everything is a Federal case. I don't see much escape from it because every time you declare a congressional policy, if the act doesn't provide for some kind of judicial relief, a group of judges who claim to be overworked will work real hard to find that again they have the keys to the kingdom as the savior of the country and will afford judicial relief by implication.

I think the basic place where you have to look at this thing is in terms of the authorized review, the kinds of cases that ought to be reviewed. There is a great place, and I think it is essential, for a certiorari type of review. Now, this is where diversity cases would come right in.

The CHAIRMAN. That is, the courts of appeals should have the right of certiorari?

Judge BROWN. That is right: Does this case deserve a review? Has it had a fair crack? There are a lot of cases on which this method would be good. For example, there are 35,000 social security cases a year that are handled. The Supreme Court wrote about it in the *Perales* case. Appeals go now to the district judge. It is really absurd. Of course, to the person the case is a great, great thing. They are disabled and most of the cases arise from an adverse award.

The CHAIRMAN. It is not a question of law but a question of fact?

Judge BROWN. It is a question of fact. You will get a question of law about once every 4 or 5 years. I don't think we can tolerate that kind of review.

Another illustration is postconviction cases. They represent in our court about 25 percent of our docket—that is 2255's and habeas corpus. In habeas the case has gone through the State system and once you have had a Federal district judge look at it in the light of 1970 standards that now apply to assure a real review, I think there is a place for certiorari.

Now, we have it in a way when a judge denies a certificate of probable cause or a leave to appeal in forma pauperis, but that is too infrequent. There we apply this kind of a standard: Should it have review?

Mr. MIKVA. Could you accomplish the same result with some kind of division into a summary jurisdiction where either with argument or minimal argument you furnish per curiam decisions rather than detailed decisions? There is a significant difference between total denial of the right of review and limitation on the right of review. We are all deeply aware of the overburdening of the circuits, but couldn't you accomplish the same result or close to the same result?

Mr. POFF. Mr. Chairman, before the witness answers, will my colleague yield?

Mr. MIKVA. Of course.

Mr. POFF. I may be anticipating what you may be about to say. I believe the Fifth Circuit about 2 or 3 years ago installed an innovative system of dividing the court into five panels with somewhat the same thing you are suggesting. Am I correct?

Judge BROWN. That is precisely so, and you have asked a good question. Why I am so disturbed and why we are concerned is that we have proved now that we increased our productivity the first year we put in screening. We call it screening, and I will explain it to you in just a minute. We increased the court's output 32 percent. This last year—you will see from the tables—with a caseload that went up to 2,100 cases and 1,600 opinions published—imagine that—we increased the number of opinions in a single year by 25 percent and the court's output by 15 percent. Now, this is all due to this screening. But, unfortunately, we now see that unless we can carry it a couple of steps further—and that means we have to have many of the so-called paralegals. Sometimes I wonder what they are, as I have never seen one yet. I recently told the Chief Justice, "Send me one. I want to look at him to just see what he looks like." For this, we are going to have to come back to the Congress and its other committees, I suppose. But I want to stress, we are going to have to have help, supporting personnel, law clerks, additional secretaries, clerks of that kind. But with screening, we have been able to do all these things. To do more, we need more help.

For the last 6 years, every year we have turned out more business than was filed the year before. There is a built-in carryover, as you know, those of you who are lawyers, in the filing of the briefs, and so on; but as against an increase of 1,000 in filings from 1967 to 1971, the carryover has only increased about 300, so we are at the most current stage we have ever been. We have reduced the median time. The trouble is, and one of the tables here will show you, that if we just go on as we are, the workload begins to get so big that the judges simply won't have the capacity to turn out that additional kind of work. This means that we know—having determined that 15 judges is the maximum—we are going to have to have some kind of help in two or three directions.

One is some sort of circuit realignment which is intelligently done. Second is a determination of what the role of the court ought to be, the character of appeals and the character of appeals to be allowed, and maybe some reduction in original jurisdiction in the district court.

Let me tell you a little bit about the Fifth Circuit screening. It seems to me that no commission can really intelligently determine where lines ought to be drawn unless they know what it is they can expect.

The CHAIRMAN. Let me ask you this, Judge.

Judge BROWN. Yes, sir.

The CHAIRMAN. If we cut down the rise of cases that go to the court of appeals, by putting some brakes on postconviction appeals, diversity cases, and social security cases, and develop some sort of system of certiorari, would there be a need for changing the geographic lines, for example, of the Fifth Circuit? You would still have 15 judges. You would want to make some changes there, wouldn't you?

Judge BROWN. I think it would be difficult to say. Let me say this: None of us want to see the circuit split. We like the circuit as it is. It has a great diversity of viewpoint. I often say that from Texas I can play havoc with Florida law, and my brothers do the same for Texas law. It does all some good. But I don't think that you could really

determine finally until you could analyze the probable effect of such changes or the appellate structure.

The CHAIRMAN. Well, in your experience in the Fifth Circuit, you did cut down the cases and the caseload, did you not, with these changes?

Judge BROWN. No. We don't cut down the cases, and we don't cut down the caseload. To the contrary, the cases have gone up, and the caseload per judge has gone up.

The CHAIRMAN. At least, you handle the cases more expeditiously.

Judge BROWN. Yes, sir.

The CHAIRMAN. Let's assume that is the case. Would you still want the Fifth Circuit divided?

Judge BROWN. Well, the projections here for 1975—found on table 10—are a pretty good indication that there comes a time when we cannot do more. In response to the question about the effect of screening, we have done three things. Screening worked so well—I have previously given you the percentage increase. In addition, we made a body count study of what active judges were doing. It showed head by head that from 1969 to 1971, each individual active judge increased his output by 38 percent. We have proved to ourselves what we wouldn't believe, that we could do more and better work. I think this proves to others that they should look at new systems, not necessarily ours, but some new systems.

We got this screening as a little germ from Mr. Justice Clark. Screening started in a modest way in the Sixth Circuit. Its function there is essentially a means to indicate how much time should be given to oral argument. The Fifth Circuit has taken ours almost word for word. The Ninth Circuit has adapted in part our system but has not gone quite as far with it.

We found that we had to deal with two things, perhaps ideas. This is an interesting thing. Everybody had this reluctance: Are you cutting somebody off from an appeal? The other idea was that this would all be trash, frivolous.

We have different classes. Class I is frivolous. Class II is a summary disposition without oral argument. Class III is a 15-minute oral argument case. Class IV is a 30-minute oral argument case. Our experience proved that the longer we are in screening, the more confidence we have that these people are getting a look-see at their case as good, if not better than those that are orally argued. We have a rule that before you deny oral argument, the three members of the panel have to agree (1) on that classification and (2) when the opinion comes out it has to be unanimous—it cannot have a dissent or special concurrence. It has to be a full 100-percent agreement.

We found, though, in this experience—and this proves the desirability of the certiorari type of review—that there were too many cases, including those on an oral argument calendar as a 15-minute or 30-minute argument, that ought never to have really taken that much limited judicial energy. Consequently, we adopted what is called rule 21 in which we outlined reasons why we can just say "affirm" or in NLRB or an agency case "enforce" the order. This is probably not a very welcome thing to the loser. All it says is enforced, rule 21; or affirmed, rule 21. We don't reverse by this rule.

We started that in last August and in that length of time with over 55 percent of our cases now going off as per curiams (those are un-

signed opinions that you like to keep short but sometimes they get long, too), 23 percent of these per curiams are rule 21 cases.

We have one judge on the court who just can't write a per curiam. He either has to write a law review article or rule 21. He has found it a helpful thing. The operation of rule 21 is explained in detail in the opinion referred to in my statement.

But we now find this isn't enough. Now we just adopted a new experiment that we are going to try from now until December 31, 1971. We have divided the court up into five standing panels. For this period we are going to use the same panels that we have used on screening. The case routinely comes to them on a roster so we avoid any kind of panel picking. We have too many sensitive cases to ever get close to that. That standing panel has the full responsibility from beginning to end of that case.

The CHAIRMAN. How do you divide the cases in proportion to the panels?

Judge BROWN. The Clerk gives them to the next initiating judge on the roster just as his name comes up without any regard to the kind of case or where it came from, so that every panel and every judge gets the same number of cases, and on the roll of the dice they will get their same ratio of types of cases.

The CHAIRMAN. You don't do it by subject classification, like anti-trust or criminal cases?

Judge BROWN. No, sir. It goes right across the board. If they decide it can be disposed of without oral argument—that is the summary II—the panel does it. We call the Initiating Judge the judge to whom the case is sent on that panel. In this way the administrative burdens are also equalized and not put on the seniormost judge of that panel. If classed as a summary II, he writes the opinion. If the panel decides that it needs oral argument they have to hear the case.

Now, there is a little therapy in that, too, because it was easy before for a judge seeing a difficult case on classification to say, "Well, let's put this down for oral argument, knowing that he might never get it."

The CHAIRMAN. Who initiates the "no soap," as it were? One of the judges of the panel, or what?

Judge BROWN. Yes, sir; it is done by the panel. One judge as the Initiating Judge gets it on a rotating basis.

The CHAIRMAN. One judge initiates it and then it goes to the panel and they vote on it?

Judge BROWN. They vote on the classification and if they decide it ought to be orally argued they have to hear it. Right now our cases disposed of as summary II's—that is, without oral argument—are running close to 50 percent. It is an interesting thing what experience will produce. We have seen the percentage of summary II go way up. Since January 1, 1971, it has been a remarkable thing. It was about 40 percent but each succeeding week it is more and more, all of which means that the judges have gained confidence in the reliability of a previously untried system.

The CHAIRMAN. Judge, by virtue of certiorari the Supreme Court only hears about 1 percent, we are told, of all cases that are decided in the U.S. Court of Appeals. That is rather an interesting item. Now, where you have these panels is there a tendency to discourage appeals? Is there any injustice done because judges may be impatient with the vast number of cases that come before the panel and may reject appeal?

Judge BROWN. I think there is always a hazard, and the farther you remove it from the nice idyllic sort of thing of a full oral argument those hazards increase. But I think you have to accept it on what we demonstrate or what other courts can demonstrate that they are capable of doing.

The CHAIRMAN. What I am trying to say is that justice is more important than the convenience of judges and more important than frugality in Congress when appropriating for improvements in the courts. Is there any diminution of the quality of justice in the method you have described?

Judge BROWN. I don't think so, but you have put your finger really on what this problem is all about. It isn't a question of convenience of judges and it isn't an effort to just get relief from burdens because I think the prospect of a Federal judge on a court of appeals of a busy area is going to be hard work no matter how it is sliced, and I don't mind it nor do our judges.

The CHAIRMAN. I don't mean to imply that the judges are in any way derelict or anything like that. I have the greatest respect for the Federal judiciary.

Judge BROWN. We know that, and I don't want to be arguing with the timekeeper, but what I am trying to say is this: that this puts the focus right on the problem. You talk about justice. Now, can you have justice if you are going to have 34,000 appeals to be handled by a single structure? What are you going to do? Are you going to have another tier of intermediate appellate courts—a kind of junior grade Supreme Court, or a senior grade court of appeals?

You can see that on the growth of population, business, and sound projections, that within the brief period of 8 years (to 1980) this country is going to be faced with a caseload that would be beyond any kind of present physical capacity. Keep in mind also that the more you proliferate these circuits in numbers, the more you add to the burden of the Supreme Court whose work right now, I think, challenge their physical capacity in a policing sort of sense to assure some uniformity in the Federal jurisprudence. So I think that justice is the factor that makes you look carefully. It is precisely why I think this commission with a wide-ranging authority, charged with specific responsibility, should and could collect a lot of very sensible views from various elements of the bar and the social and political community across the Nation to see what ought to be done.

Another factor that is very significant is the increase in appeals in contrast to the increase in trials. I have attached as an exhibit an extract from the Shafroth 1970 revision. For the Fifth Circuit it shows that while civil trials went up 97 percent, civil appeals went up 157 percent. But here is the alarming figure: Criminal trials went up 48 percent but criminal appeals went up 210 percent. Every sixth case was appealed in 1960. Now every third case is appealed and the chances are this is going to get worse with the increased payments to counsel under the amended Criminal Justice Act. Add to this the allowance of fees in habeas and 2255 cases.

Mr. POFF. Mr. Chairman, I hope it doesn't interrupt the train of thought here but it is important to me to understand a little more about the functional method involved. As I understand, you have four categories of cases with five panels.

Judge BROWN. We have five panels.

Mr. POFF. Four categories of cases?

Judge BROWN. Well, our docket divides itself up into habeas corpus, 2255's, direct criminal appeals, and then civil cases. That is all thrown into the hopper and, mind you, when we talk about habeas corpus and 2255's it means that case has survived the certificate of probable cause. This is not the letter from the prisoner, "Please give me some relief." This is where we have a difference in our statistical methods with some one or two other circuits since they treat every letter, and so on, as a case. Only after a certificate is granted does the case go on the docket. Under screening, when the time expires for the last brief under the rules—this is about 65 or 70 days from the filing of the record—the clerk simply looks at this roster to see who in turn is the next initiating judge, and what is the next panel (A, B, C, D, E). If it is panel B he gives it to the next initiating judge on panel B. The clerk doesn't know, himself, what kind of a case it is. He doesn't pick it or choose it, and every panel gets its ratable share of every kind of business.

Through a project that we hoped the Chief Justice could get the Judicial Center to support financially we were going to divide the cases into two main categories: (1) 60 percent of them would comprise diversity, habeas corpus, 2255's, social security, labor cases, and direct criminal appeals because we thought the percentage of summary II's going off on oral argument would be higher in that category; (2) the remaining 40 percent would comprise the balance of docket by types. In the early days of the screening some of the judges said, "Patent cases are always difficult. We ought not to screen them. We should put them down for oral argument," or tax cases. But we determined that is when you run risks of injustice and unequal treatment because the prisoner ought to at least have as good a chance as somebody who has a million dollars to finance a patent case. So we have, and have had, no categories of cases that are automatically given a particular type of treatment.

Mr. POFF. I see in cases out of the Fifth Circuit references to what are called summary II's and I assume you have a summary I category, and that you have a category III and category IV. Summary II, as I understand it, is a case that is decided on the brief without oral argument, and category III is the case that is decided with 15 minutes' oral argument, and category IV the case decided after 30 minutes, but what is category I in that complex?

Judge BROWN. That is a frivolous case. In the beginning we thought we were going to have a lot of frivolous cases, just judicial trash. It didn't turn out that way and so most go off as II's.

You will see on page 32, table 8—this includes the first 9 months of 1971—that since 1969, out of 2,958 cases that we had briefed and screened—that is across the board—1,131 were these summary II's. They break down for that period 31 percent for habeas, 28 percent were direct criminal appeals, and 40 percent were civil appeals.

Mr. POFF. I am interested in the process by which the determination is made into which category each case will be placed.

Judge BROWN. Well, it is a judicial judgment. It is not made by law clerks. Law clerks are essential in this process but the judges have assumed the direct immediate, personal responsibility. We outline some

of the factors in the opinions I have written for the court at its request, some of which are cited in my statement. I think that the most important factor is: Do you think oral argument is going to be of any real help?

Mr. POFF. Well, now, does a lawyer for the litigant have any input into that decisionmaking process?

Judge BROWN. Only by the quality of his brief. In fact, we put a star on the calendar which would indicate it is a 15-minute case and my comment on the call of an oral calendar always is that:

You have gotten this star. It either is an indication that your case has little or no merit or that you have done such a wonderful job that you don't need argument or more time.

Well, a tax case is not a very sexy thing, say, an estate tax case. You can't even state the problem when you put the papers down. It is that complicated. Likewise with a Fair Labor Standards Act case with an exemption for overtime rather than a rate of pay. Those congressional standards are inevitably so complicated that all the oral argument in the world is not going to help the judges in an understanding of the case.

On the other hand, there are certain kinds of cases that you just know ought to be orally argued because of their public importance.

We have, for example, the *Town of Shaw* case that made quite a sensation where a panel of our court ordered that the town of Shaw, Miss., do a lot of sewer digging and telephone and electric light power installing because of racial grounds.

We have a kind of instinctive feeling about this. But we have tried to be fair with the bar. I have three opinions (referred to in my statement) that collect both the statistics on why we had to do it and what our methods are. The remarkable thing is that we have had but three challenges to this system and each one has survived certiorari—two criminal cases and one civil case. We all know that doesn't mean anything finally, but the Solicitor General each time filed a formal memorandum in support of our practice. Apparently, the Justices of the Supreme Court were not disturbed by our new methods.

Mr. POFF. Do I understand that each of these panels has the power to make a dispositive decision? Does the full court hear the case after the panel has concluded hearing?

Judge BROWN. No. Only if a majority of the active judges votes for en banc is the panel decision reviewed by the full court. Then we have the responsibility under the statute to hear a case en banc.

The CHAIRMAN. How often do you hear cases en banc?

Judge BROWN. We have had approximately 35 in the last 2 years but we have not had any orally argued cases en banc for 2 years. There is a trend in the court now, I think, that with this standing panel device we are going to have more and more oral arguments in en banc.

The CHAIRMAN. Let me ask this question, Judge. It is more or less a philosophical question. Do you think appeal in a Federal forum is a matter of right? If it is a matter of right does the discretionary power that you describe—whether to hear or not to hear the appeal—undermine that right?

Judge BROWN. I think that is one of the basic problems—to what extent should the system now tolerate, allow, or require or permit an appeal as a matter of right. That is what we have in nearly every case now. You can rack off habeas by denial of CPC. But in direct criminal

appeal, this would be the rare case where appeal is frivolous. Add a few bankruptcy cases, and that is just about it. The rest of them are entitled to a review as of right and I don't know how long the system itself—not the judges but the system—can stand that.

MR. ZELENKO. The Fifth Circuit I believe, with the panels as you describe, is really using a kind of certiorari procedure now, isn't it?

JUDGE BROWN. No, I don't think so, although we are a firm believer in the need for statutory power for certiorari action. What we do as a summary II is dispose of that case on its merits. This is borne out by the fact that the figures will show that of the opinions written in the summary II cases approximately a third of them are signed opinions.

I saw one recently by Judge Thornberry, one of your former colleagues, who has made a wonderful judge, I will tell you that. His opinion as a summary II was a signed opinion and it was 29 pages long. It had every kind of serious question. I forget the area of law but it was Federal legislation. We dispose of the case on its merits and by summary II we do not undertake to say, "Well, this is just not worthy of review."

Rule 21 is also a decision on the merits. It is a judicial determination. One of the factors for rule 21 is that precedential value is afforded by an opinion in the case, either per curiam or a signed opinion. When you start talking about 1,600 opinions we are publishing each year—of 14 volumes that West Publishing Co. publishes each year for the court of appeals, the Fifth Circuit has five of those volumes—it is almost impossible for us to keep up with them ourselves.

MR. BROOKS. This is an outstanding record, I think, and a good innovation. Have any of the other circuit courts adopted this procedure to expedite their consideration on the merits of the cases submitted to them?

JUDGE BROWN. The Eighth Circuit has come as close as any to the system we are following. They have one difference, the cases are put on a calendar which, so far as we see it, accomplishes little and, on the converse, loses much of the time in disposition which we save.

One of the things gained by our screening is not only increased output but increased speed of output. This is important since one of the scandals today is this terribly long time between conviction to affirmance in criminal cases.

For example, on a direct criminal appeal the last brief is due, say, on October 1. It gets to an initiating judge (both under the new standing panel system or under our former screening system) within 2 or 3 days. It takes about a week for the thing to go through the mill, just by sending it to Austin or to Florida, wherever the three members of the panel are. Suppose they agree on a summary II as a case to be disposed of without oral argument. It comes back to that initiating judge. He writes an opinion right then. It is not at all uncommon for an opinion to be published within 30 to 45 days of the time of the last brief. That has decreased our median time way down on disposition generally, and on criminal cases and postconviction cases we are down to a record that I don't know whether it can be improved.

MR. BROOKS. I would say of the lawyers in my district that I have never heard a complaint about the appeals procedures that exist in the Fifth Circuit court. They don't feel that they are getting a bad shake. They feel that they get fair and prompt treatment. I think that

it is an indication that the innovations developed by Judge Brown in that court and utilized by his 15 judges do work and meet the need. I think that we may really be talking about the wrong thing when we talk about changing the circuit lines. The facts are, how can we make it possible for these judges who are willing to work to do their job. The Fifth Circuit is a good example. There may be some others. I agree with the chairman in that I have some doubts, if I understand you correctly, Mr. Celler, as to whether or not we can have enough circuit court judges scattered throughout the United States to give everybody a full oral hearing. We don't have that many judges that we can appoint.

Mr. POFF. My colleague, in his usual fashion, goes to the heart of things and it prompts me to suggest that it would be helpful if the record at this point could show the ratio of applications for certiorari arising out of the Fifth Circuit as compared with the national average.

Judge BROWN. I don't know what it is. There are figures in the Directors report at the Administrative Office on that which I think would be quite complete and accurate as they deal with cases actually disposed of.

Mr. POFF. But if the ratio were low it would speak well for the innovation the judge has made, and I would rather expect that the percentage ratio would be low.

Judge BROWN. Let me give you another illustration of the use of our new methods. In the Chief Justice's opinion in this recent school desegregation case, the *Swann* case, I transmitted this information while the case was pending, without, of course, going to the merits at all. We used this standing panel, that is, this screening panel system for school cases, as well. This was in December of 1969. We had just then been chastised by the Supreme Court and reversed summarily for a little extension of time I granted to the Secretary of Health, Education, and Welfare whose emissary made a call to my house at 10 o'clock at night—the first time I had ever seen a safe-hand courier since I was a second lieutenant—and the Supreme Court, in effect, told us to get on with the business. We had a council meeting and we decided that the moment an appeal came up, the panel assigned by roster with no chance of panel picking would have that case from then on.

Some of these in a course of 6 months were appealed three different times from about December 3, 1969, until September 12 last year, 1970, at which time we decided that we would wait for the Supreme Court to speak and say no more until they did. This we announced to the bar. In that short 9-month period we had disposed of 193 school cases, some of which were appealed as many as three different times.

We cut down the time for notice of appeal. We cut down the time for filing of the record. We cut down the time for filing of briefs. Remarkably, we only heard three of those 193 orally. Well, there were a lot of people who didn't like that method but in only one of them was certiorari granted, and this was on the merits, not method.

Mr. HUTCHINSON. Mr. Chairman, may I make an inquiry at this point?

The CHAIRMAN. Yes.

Mr. HUTCHINSON. Judge, in order to clear up some present confusion in my mind, when a case is assigned to a panel and it decides that, let's say, it is worthy of class IV consideration and now under your present arrangement that same panel hears the case, hears the oral

argument, and so on, then that same panel or one of the judges on that panel then prepares an opinion?

Judge BROWN. Right.

Mr. HUTCHINSON. Then does the full court, 15 judges, sit in conference on that case?

Judge BROWN. No; this was never followed in the good old days when we had plenty of time. Each panel is the court of appeals. The statute says it sits in panels of three judges or the full court. You can't have it in between. Here is where the full court comes in. First, sensitive to our responsibility as a court for everything that goes out from each of the panels, we have now come up with a couple of other methods since we have mechanical problems of people scattered so far. We call them pinkies and prepinkies. That is one of my innovations. This is simply a cover sheet to alert the judge with this mass of material to the need for action and the deadline.

The pink cover sheet instructions advise each active judge that here is a request—either by a party or by one of the judges—for reconsideration by the full court. In others it is a letter expressing from a judge some concern about the panel's opinion. So that we are well disciplined toward reading this mass of opinions, 1,600. That means close to 150 a month and they will come out in slugs like that. If a judge sees a decision of a panel that he is disturbed about he writes that panel. We have a detailed systematic system. Copies go to all the other active members of the court. Hopefully, the panel can work out the cause of disturbance. We are concerned at that stage primarily with the opinion as a precedent, what is it going to do in terms of a precedent. This is so because we do try to follow the practice of not overruling another panel and most of the time when we do it it is inadvertent. We are pretty well disciplined.

Now, the parties under the statute are not entitled to an en banc nor can they demand a vote. All they can do is request it and the Supreme Court ruled that they were entitled to a vote by the judges, if, but the "if" is a big one, a member of the court requests a poll.

Now, we have had approximately 300 applications or petitions for rehearing en banc over the last 4 years. Of those, in 267 the judges have declined to ask for a poll. They just automatically go off and then the panel has the full responsibility. Of that 300, only 35 mustered enough concern to have a poll. Of course, without problems, in order to expedite action, I devised a form letter for the poll and I have a ballot that is as good as any political party ever devised. On a single ballot we were voting "Grant" or "Deny" petition for rehearing, and with or without oral argument.

Now we have decided that we are going to try two ballots. We vote first on en banc. If it is granted, then I submit another ballot to the judges as to oral argument. This makes it a little bit easier because sometimes the temptation is great to look at the physical, logistical problems of assembling.

For example, the only place we can have an en banc argument is in Houston.

We have a removable, retrievable, collapsible double-tiered bench. Some counsel addressing us in a school case once said he hoped that the judges on the lower tier would not feel that in addressing the senior members he was speaking over their heads. But those are some of the problems.

The CHAIRMAN. Judge, I gather from reading your statement that you suggest that the revision of the Fifth Circuit boundaries will not ease the caseload per judgeship in the fifth circuit; am I correct?

Judge BROWN. That is correct.

The CHAIRMAN. I take it that you mean additional judges would be required in addition to the circuit revision?

Judge BROWN. That is the only way we would get any relief there. You could split it up into, say, three circuits but for this business you are going to have to have *x* judgepower and that will mean, say, 22 or 25 total and that comes back again to illustrate this basic question of what is it you expect.

The CHAIRMAN. If we authorize additional judges we will go beyond the nine judge limit suggested by some.

Judge BROWN. Well, my feeling is that there should be no limit to nine and that you can make a 15-judge court work, and work well. There is a feeling expressed by some very distinguished people, Judge Lumbard, for example, who just recently stepped down as chief judge of the Second Circuit, who firmly believe that nine is all you can really handle.

The CHAIRMAN. That is what he told us the other day.

Judge BROWN. There are problems. We have problems growing out of size, but I just think if you look at this realistically, a nine-man court is a dream. Mr. Hutchinson, did I answer your question?

Mr. HUTCHINSON. Yes; Judge, you did.

Mr. McCLORY. Would the Chairman yield for a question?

The CHAIRMAN. In a minute. Beyond provision for additional judges you would recommend that we address ourselves to legislation concerning post-conviction remedies, diversity of citizenship jurisdiction, the uses of certiorari by courts of appeals, social security cases, revision of the courts into panels, the use of oral arguments, and so forth. Is there anything else that should be done besides these reforms?

Judge BROWN. Well, that covers pretty much everything, I think. I think this inquiry is long overdue. I have been sounding this everywhere to the point where I am almost becoming an irritant, I guess.

The CHAIRMAN. What kind of guidelines should the bill contain to assist the Commission in developing new circuit boundaries? Have you any suggestion for guidelines? You wouldn't want one State to constitute a single circuit.

Judge BROWN. As to how to state it, I am a little uncertain. My observation is that judges do fairly well, maybe, in interpreting law, but they are poor draftsmen. Every time there has been a bill drafted by judges and submitted to the Congress by the Judicial Conference, we have had to amend it later on because it didn't say what we intended it to say. I would leave that to the skilled people in the Congress. You are capable of doing it. In the Transportation Act, you have the transportation policy of the United States. In the crime on the streets bill, you have what the policy of the United States is; and this Commission should be charged, however you articulate it, with the responsibility of looking into this problem of the intermediate appellate system of the United States, the Federal judiciary, what it can do, what is needed, what kind of reductions or increases are advisable and then charge the Commission also with exploring fully the innovative methods of courts, not only the Fifth Circuit but the Ninth Circuit

the Sixth Circuit, the Eighth Circuit, in trying to solve some of these problems.

I think there is a place for the Commission to do that, because we hope that it would have fine people on it that would have a great interest. One of the problems that just came to mind by the remark the Chairman made, is this one about oral argument. Now, that is a pretty serious question. The tradition has been that you are entitled to be heard orally. We have had to abandon that in over 50 percent of our cases.

Now, I think the Nation needs to decide: Is that a sound thing? The Congress may have doubts about the system we are following. They may say, "What would you be faced with; well, what is the prospect?" The answer is revealing. I can show you on these tables in my statement that, for example, next year we will have 1,720 cases as a minimum to hear; that is, dispose of. If we heard those on oral argument at 20 cases a week—and that is all we have ever been able to handle—we would have 85 court weeks. Now, with just 15 active judges, and assuming they sit 15 weeks which is twice what they are able to do now with screening, we would still need 75 visiting judges. You can't get them. You just can't get them. And even if you got 30—that is perhaps attainable—there are still some difficulties.

These tables show the cumulative backlog, and it runs from 280 the first year—next year, fiscal year 1972—up to nearly 2,200 in 1975, just 3 years from now. No matter how distressing, that is the answer to people who deplore the absence of oral argument; with case filings of the kind we now have and which the Nation will soon experience, the system will collapse. We would be in a state of chaos with backlogs of scandalous proportions that, on oral argument alone, would take as much as 3 years to wipe out.

The CHAIRMAN. You just think that Congress should take an adjournment for 3 years, and with less burdens you will have less cases?

Judge BROWN. That would make this job the sinecure which people told me I was getting when I got appointed.

The CHAIRMAN. Any other questions?

Mr. HUTCHINSON. Mr. Chairman, may I inquire further? Judge, I understand you are a strong proponent of the commission approach to this whole problem, not only in determining the territorial bounds of circuits, but in tightening all of these procedural changes and limitations upon the appellate power and what not.

Judge BROWN. Yes, sir.

Mr. HUTCHINSON. This disturbs me a little bit. For the sake of argument at the moment, maybe Congress might get wrapped up in politics in trying to define exactly where a circuit boundary should be, but if we turn over to a Commission this whole task of limiting the appellate power and so on, it seems to me, Judge, as though what we are doing is turning over to the Commission a job that Congress under the Constitution is expected to perform. I don't want to quarrel about it, but I just want to state that. I take it you would disagree with me.

Judge BROWN. Well, I don't think I really do disagree with you. I think that in part this is inevitable with a commission, but I think it is still good if for no other reason than this: For them to simply draw

circuit lines is no solution at all. It is just no solution at all. So you don't want to charge them with a job that is both superficial and absolutely of no real meaningful effect. What do you want them to do? You want them to recommend circuit lines in the light of policies which would be good but which admittedly Congress would have to determine. And I am quite careful here to say that obviously they cannot make policy determinations and submit that as a kind of reorganization plan structure for the Russian type of veto; circuit lines, yes, that are based on that. When the Congress examines these underlying inquiries and policy determinations that the Commission recommends as the basis for their circuit line drawing, the Congress will have to say whether these are good or bad. You might conclude: "We can't take their lines because they are based on some policies we find unacceptable." So I think there would still be a big job for Congress, a big job for Congress. But from the standpoint of the Fifth Circuit, which has nearly 25 percent of the whole business of the courts of appeals in the United States, I can't imagine if they drew some circuit lines, how we would get one dime's worth of relief out of it. Do I answer your question now, Mr. Hutchinson?

Mr. HUTCHINSON. Yes, Judge, you have. Thank you.

The CHAIRMAN. Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman. I want to say, Judge, that you have provided a very illuminating and very helpful statement here in your testimony before the committee and I want to express my appreciation. Also, I would like to ask a couple of questions.

One is don't you feel that it would be a preferable approach to have a commission which would make recommendations with the Congress undertaking to review those recommendations rather than for Congress to originate legislation?

Judge BROWN. I am not sure that I understand, Mr. McClory.

Mr. McCLORY. Well, the commission form which is embodied in the bill before us would provide that the recommendations of the commission would automatically become a law unless the Congress undertook to veto those recommendations and that then in effect it would become law without the President receiving a piece of legislation and approving or disapproving it. I am just wondering if you don't feel that it would be a preferable procedure for the commission to recommend to the Congress new geographical lines, recommendations with regard to a change in procedures or change in the types of cases that are to be heard on appeal, and then the Congress to act on the basis of those recommendations in a direct manner as we do act on most legislative proposals?

Judge BROWN. I go so far with you that I really hesitate to disagree at all. I think the virtue of the commission recommendation of the circuit lines after the commission has been charged with responsibility to determine these and recommend underlying policies is that if the Congress accepts the underlying policies upon which the recommended lines are drawn to effectuate this, a lot of such policies would have to be expressed in terms of active legislation. In that way the circuit lines could be accepted without what we are told are the political problems when you start pushing States from one circuit to another. This is to say that I think there is a great value in the commission-type of structure and the report on circuit lines has to be definitive, that is,

definitive in the sense that it is, for example, to be drawn between the States of Michigan and Ohio, or here or there.

For example, suppose the Commission decides, "Well, we ought to have a certiorari type of case" and in these categories, diversity, 2255's, post-conviction. That would take affirmative legislation. You could adopt the circuit lines and you would know we would not get any workload relief out of it, even though we could still be restructured geographically. However, before the help would come the Congress itself would have to review that policy and then write a statute because right today the Judicial Code commands us with the duty to take every case except—and you can put about 1 percent in the exception. Congress and the President can alone bring these changes about. Did I answer you? Does that help you any?

Mr. McCLORY. Yes.

Mr. POFF. If my colleague would yield, if I interpret my colleague's concern, actually it is that if we pursue the procedure sketched in the bill and the Commission makes its report and the Congress fails to veto it and it theoretically becomes valid automatically, and then subsequent to that point in time someone challenges the constitutionality of that legislative process and if the court should find that the process was unconstitutional, what a shambles the system would be faced with. Do I correctly interpret that?

Mr. McCLORY. That is implicit in the question, although I gather that the judge finds no constitutional obstacle.

Judge BROWN. I don't suppose you could ever say that about anything, but I am sure the conception of this is that you have a rich history now and the Congress has apparently found it to its satisfaction in reorganization plans. For example, the Federal Torts Claims Act came through a reorganization plan. All of a sudden I had a good claim against a steamship for a dock damage. I didn't have it the day before. It was in the form of a reorganization plan. You have often done that. And we all benefit from the salary revision bill. Now, I guess nobody has been greedy enough to challenge that. I suppose somebody could challenge it.

Mr. POFF. Would my colleague yield?

Mr. McCLORY. Yes.

Mr. POFF. That is hardly on all fours with the procedure——

Judge BROWN. That is right.

Mr. POFF (continuing). Because involved in this case and not in the one you put is the question of the prerogative of the Chief Executive to sign legislation passed by the Congress, and this procedure makes no provision for the Chief Executive.

Judge BROWN. I guess the theory is when he signs this bill with whatever modifications he has in effect agreed——

Mr. POFF. He would be estopped? He would waive his constitutional powers? I wonder if a President can waive his constitutional powers.

Judge BROWN. We would give you at least a class III on that contention, I tell you that.

The CHAIRMAN. I don't know whether this question is appropriate or not, but if the matter came before you at some future time would you care to indicate what the decision would be?

Mr. POFF. I hope the Chairman doesn't mean to put that question in quite that form.

The CHAIRMAN. I will put it in judicial form. The questions and answers seem to have the same import. You seem to imply that you do approve of the bill; that is, a commission could draw these lines.

Judge BROWN. I think it is worth running the risk. There may be constitutional problems but I think it is worth running the risk and I can speak with some freedom because the prospect of my going farther north than the northern border of Texas is pretty remote at this stage. I have a good deal of latitude, I think. I believe that there is a pretty good chance that the system would be sustained.

The CHAIRMAN. Judge Friendly, in his statement, stated the following:

Another possibility would be to create the Commission, instruct it to report on Circuit realignment in a short period, say six months, with the legal effect provided in Section 6(b) of the bill, and then go on to make further recommendations, with respect to which affirmative Congressional action would be required. Perhaps that would be the best solution of all.

Do you agree with that?

Judge BROWN. I don't disagree with it in the policy expressed. He said so briefly and so well what I took 40 pages to say and he is not known either for being short in his opinions. We both suffer from somewhat the same problem only he is more scholarly. My criticism of that is, and I think I know something about this, I defy anybody to come up with an intelligent realignment of these circuits in 6 months to give any kind of real relief. I just don't see it. You can play with these figures any way you wish. I even gave you a map so you can look at it. It is right there. But as far as the other policies, I think there is a need and he seems to recognize that we have to look into this thing to see what ought to be done. So, on the disturbing problems we are together.

Mr. POFF. Do you think that a geographical realignment of the circuits might necessarily entail geographical realignment of the districts within the circuit?

Judge BROWN. Not the district boundaries, I wouldn't think so.

Mr. POFF. Not necessarily, but might possibly?

Judge BROWN. Yes. I will make this point here: that you have a look at the business. Where does the business come from? Ninety percent of ours comes from the district courts and that is where you have to look to see what is going to happen. To just say there are so many district judgeships, and there are so many States, and even so much population, you end up with a very unrealistic sort of determination. I think the Second Circuit would be a good illustration. I am sure a disproportionate part of their business populationwise comes from the Southern District and the Eastern District of New York.

The CHAIRMAN. Mr. Zelenko.

Mr. ZELENKO. Judge, do you envision this Commission as authorized to create additional circuits as well as to revise existing lines and to keep the number at 11?

Judge BROWN. You know, I never thought about that, and perhaps that proves that the bill is inadequately structured. I am not sure but what it does permit that but it is pretty vague. It says, and you know it better than I:

* * * the present division of the United States into the several judicial circuits, and to recommend to the President, the Congress, and the Chief Justice such changes as may be most appropriate for the expeditious and effective disposition of judicial business.

If they aren't charged with the duty of recommending the creation of some new courts of appeals I don't see how they can do anything worthwhile since once again the Fifth Circuit is itself the finest example.

Mr. ZELENKO. In that connection, then, Judge, would it be helpful to the Commission to have some guidelines in the legislation? For example, should there be a maximum number of circuits that should be authorized?

Judge BROWN. I think that is a question that has to be decided. I gave you the illustration that on these 1980 projections you are going to have 35 circuits. Obviously, that system is going to be entirely different from what we have today and I think the Congress would have to recognize it. I think, first, you would have a series of parochial courts and you would have an impossible burden on the Supreme Court for an intelligent sort of national consistency. So the Congress would have to decide how many courts of appeals can the Nation really tolerate, and that brings you right down to these very basic questions.

Mr. ZELENKO. The Judicial Conference apparently doesn't recommend any specific criteria or standards to guide the Commission in considering the creation of new circuits or revised circuits. For example, a minimum number of district judgeships, a minimum number of districts, a maximum number of circuits, a maximum number of circuit judges, a minimum number of circuit judges, a prohibition against a circuit containing only one State, a prohibition against a State being divided between or among circuits, and so forth. These are matters I gather from your testimony which also should be considered.

Judge BROWN. I think so.

Mr. ZELENKO. Thank you, Judge, very much.

The CHAIRMAN. Judge, this is a very knotty and intricate problem and you have certainly been helpful in untying some of the knots and your statement has been very illuminating. We always welcome your presence here and we especially welcome you at this point.

Judge BROWN. I hope you will let me come back.

The CHAIRMAN. We are very grateful to you.

Judge BROWN. May I take this opportunity to present to the other members of the Committee my secretary, Mrs. Blackstock, whom I introduced to several of the members earlier. She is my right hand on these matters.

The CHAIRMAN. Yes, indeed.

Judge BROWN. I don't know why she didn't have a few more facts and figures in my statement but I have given you enough.

It is a pleasure to be here and we are confident that we have an understanding heart in the Congress. Thank you very much.

The CHAIRMAN. We have received the statement of Judge Alfred P. Murrah, Director of the Federal Judicial Center. It is clear that the Judicial Center has given some attention to the subject of revision of circuit court boundaries. We shall hold Judge Murrah's statement until we are able to reschedule his appearance.

I believe it is very important to have Judge Murrah testify on this subject. The hearing will adjourn until we can arrange for the presence not only of Judge Murrah but of Judge Friendly, who is the chief judge of the Second Circuit.

(Whereupon, at 11:30 a.m., the subcommittee adjourned, subject to the call of the Chair.)

CIRCUIT REALIGNMENT

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 729

THE REALIGNMENT OF THE FIFTH AND NINTH CIRCUIT
COURTS OF APPEALS

PART 2

MARCH 18, 19; MAY 20 AND 21, 1975

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CIRCUIT REALIGNMENT

TUESDAY, MARCH 18, 1975

U.S. SENATE.
SUBCOMMITTEE ON IMPROVEMENTS
IN JUDICIARY MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 o'clock a.m., in room 6202, Dirksen Senate Office Building, Senator Quentin N. Burdick [chairman of the subcommittee] presiding.

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

The CHAIRMAN. The subcommittee has scheduled 3 days of hearings this week on S. 729, a bill to reorganize the fifth and ninth judicial circuits. Today's hearings will be devoted to witnesses from the fifth circuit.

Perhaps the dimension of the problem that this legislation is designed to solve can be demonstrated by a brief recitation of recent history. The subcommittee first held hearings on this problem in May of 1972 in connection with a resolution to create the Commission on Revision of the Federal Court Appellate System. The statistical data available at that time was for fiscal year 1971 and reflected the fact that in that year filings in the fifth circuit totaled 2,316 cases and in the ninth circuit totaled 1,936 cases. Legislation creating the commission was signed by the President on October 13, 1972, and the Commission began its official existence on June 21, 1973. After extensive hearings throughout the country, and particularly on the west coast and the gulf coast, the Commission issued its first report on December 18, 1973, in which it recommended that the fifth and ninth circuits be divided so as to create within the fifth circuit a new eleventh circuit and within the ninth circuit a new twelfth circuit. The report of the Commission was based on statistical data for fiscal year 1973, which disclosed that in that year filings in the fifth circuit totaled 2,964 and in the ninth circuit totaled 2,316.

Since the Commission's report, filings in the fifth circuit jumped another 11 percent to 3,294 cases and in the ninth circuit the increase was 161½ percent to 2,697 cases.

In the last Congress, this subcommittee held a total of 12 days of hearings on the problems of the circuit courts. In late Septem-

ber and early October of 1974, the subcommittee devoted 6 days of hearings to the problems of the fifth and ninth circuits. As a result of these hearings, the subcommittee on December 2, 1974, made wide distribution of a so-called clean bill in the form of a committee print revision of S. 2990. The concept set forth in that clean bill modified the recommendations of the Commission on Revision of the Federal Court Appellate System for the creation of a new eleventh and a new twelfth circuits and instead recommended that each of these circuits be reorganized into two divisions within the existing circuit. As a result of comments received and continuing discussions, additional changes were made in the so-called clean bill leading to the introduction of S. 729 in the form in which we are considering it today.

S. 729 proposes to reorganize the fifth circuit into a western division consisting of Texas and Louisiana and an eastern division consisting of Mississippi, Alabama, Georgia, Florida, and the Canal Zone. Also under the bill, the ninth circuit would be reorganized into a southern division, consisting of Arizona, Nevada, and the southern and central judicial districts of California, and a northern division, consisting of the States of Oregon, Washington, Idaho, Montana, Alaska, Hawaii, and the Territory of Guam.

With the circuits reorganized in this fashion, the bill proposes to create a total of 8 additional judgeships in the two divisions of the fifth circuit and 7 additional judgeships in the two divisions of the ninth circuit. Thus, the average caseload of 220 filings per judge in the fifth circuit and 207 filings per judge in the ninth circuit would be substantially reduced to a caseload of approximately 145 filings or less, per judge. According to the evidence received by the subcommittee during its lengthy consideration of this problem, the reorganized circuits, with the additional judge power provided in this bill, should be able to substantially reduce and eventually eliminate the intolerable congestion and delay which the rapidly increased caseload over the past years has forced upon litigants in these two circuits. Moreover, according to the evidence received by the subcommittee, the reorganization coupled with the increased judge power will greatly diminish the need for these circuits to rely upon various expedients as a means of coping with the huge caseload in these circuits.

We are pleased to have as our initial witness the senior Senator from Nebraska who is not only the ranking member of the Judiciary Committee and this subcommittee, but also the Chairman of the Commission on Revision of the Federal Court Appellate System. In this latter capacity, Senator Hruska has labored long and hard in an effort to solve the problems afflicting our Federal Courts of Appeals.

At this point, a copy of S. 729 will be incorporated in the record without objection. We will also receive a prepared statement from Senator Chiles who was unable to be here at this time.

[The documents referred to follow:]

S. 729

IN THE SENATE OF THE UNITED STATES

FEBRUARY 18, 1975

Mr. BURDICK (for himself, Mr. FONG, Mr. HRUSKA, and Mr. McCLELLAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by reorganizing the fifth and ninth judicial circuits, by creating additional judgeships in those circuits, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 41 of title 28 of the United States Code is
4 amended to read in part as follows:

1 “The eleven judicial circuits of the United States are
2 constituted as follows:

“Circuits	Composition
*	*
*	*
*	*
*	*
*	*
“Fifth:	
Eastern Division-----	Alabama, Florida, Georgia, Missis- sippi, Canal Zone.
*	*
*	*
*	*
*	*
*	*
“Fifth:	
Western Division-----	Louisiana, Texas.
*	*
*	*
*	*
*	*
*	*
“Ninth:	
Northern Division-----	Alaska, Eastern and Northern Ju- dicial Districts of California, Ha- waii, Idaho, Montana, Oregon, Washington, Guam.
*	*
*	*
*	*
*	*
*	*
“Ninth:	
Southern Division-----	Arizona, Central and Southern Ju- dicial Districts of California, Ne- vada.”.

3 SEC. 2. A circuit judge in active service of either the
4 fifth or ninth circuit as constituted the day prior to the effec-
5 tive date of this Act is assigned as a circuit judge of that
6 division of either the fifth or the ninth circuit within which
7 is located the State or judicial district within which he resided
8 at the time of his original appointment to be a circuit judge
9 of either the fifth or the ninth circuit and his seniority in serv-
10 ice shall run from the date of his original appointment to be
11 a judge of such circuit.

12 SEC. 3. A circuit judge in senior status of either the fifth
13 or ninth circuit on the day of the effective date of this Act
14 may elect to be assigned to either division of his particular
15 circuit and he shall notify the Director of the Administrative

1 Office of the United States Courts of the election made by
2 him.

3 SEC. 4. Where on the day prior to the effective date of
4 this Act any appeal or other proceeding has been filed with
5 the circuit court of appeals for either the fifth or the ninth
6 circuit as constituted before the effective date of this Act—

7 (1) If any hearing before said court has been held in
8 the case, or if the case has been submitted for decision, then
9 further proceedings in respect of the case shall be had in the
10 same manner and with the same effect as if this Act had not
11 been enacted.

12 (2) If no hearing before said court has been held in
13 the case, and the case has not been submitted for decision,
14 then the appeal, or other proceeding, together with the
15 original papers, printed records, and record entries duly
16 certified, shall, by appropriate orders duly entered of record,
17 be transferred to the division of the circuit court of appeals
18 to which it would had gone had this Act been in full force and
19 effect at the time such appeal was taken or other proceeding
20 commenced, and further proceedings in respect of the case
21 shall be had in the same manner and with the same effect as
22 if the appeal or other proceeding had been filed in said court.

23 SEC. 5. The President shall appoint by and with the
24 advice and consent of the Senate, three additional judges

1 for the Eastern Division of the Fifth Circuit, five additional
2 judges for the Western Division of the Fifth Circuit, two
3 additional judges for the Northern Division of the Ninth
4 Circuit, and five additional judges for the Southern Division
5 of the Ninth Circuit: *Provided*, That the appointments
6 made under this section shall become effective on the date
7 specified in section 26 of this Act: *And provided further*,
8 That at the earliest practicable date after the date of enact-
9 ment of this Act the President shall submit to the Senate of
10 the United States his nominations for the additional judges
11 authorized in this section and that after such submission
12 the Senate shall proceed to consider such nominations at
13 the earliest practicable date prior to the date specified in
14 section 26 of this Act.

15 SEC. 6. Section 48 of title 28 of the United States Code
16 is amended to read in part as follows:

17 **“§ 48. Terms of court**

18 “Terms or sessions of courts of appeals shall be held
19 annually at the places listed below, and at such other places
20 within the respective circuits as may be designated by rule

1 of court. Each court of appeals may hold special terms at
 2 any place within its circuit.

<i>"Circuits</i>	<i>Places</i>
* * * * *	* * * * *
"Fifth:	
Eastern Division-----	Atlanta, Jacksonville, Miami and Montgomery.
* * * * *	* * * * *
"Fifth:	
Western Division-----	New Orleans and Houston.
* * * * *	* * * * *
"Ninth:	
Northern Division-----	San Francisco, Portland and Seattle.
* * * * *	* * * * *
"Ninth:	
Southern Division-----	Los Angeles.

3 *Provided, however,* That the court of appeals of the Fifth
 4 Circuit-Eastern Division is authorized to hold terms or ses-
 5 sions of court at New Orleans until such time as adequate
 6 facilities for the court are provided at Atlanta."

7 SEC. 7. Section 42 of title 28, United States Code, is
 8 amended to read as follows:

9 "The Chief Justice of the United States and the Asso-
 10 ciate Justices of the Supreme Court shall from time to time
 11 be allotted as circuit justices among the circuits or divisions
 12 thereof by order of the Supreme Court. The Chief Justice
 13 may make such allotments in vacation.

14 "A justice may be assigned to more than one circuit or

1 division thereof, and two or more justices may be assigned to
2 the same circuit or division thereof.”

3 SEC. 8. Section 43 of title 28, United States Code, is
4 amended to read as follows:

5 **“§ 43. Creation and composition of courts**

6 “(a) There shall be in each circuit, or division thereof, a
7 court of appeals, which shall be a court of record known as
8 the United States Court of Appeals for the circuit or division.

9 “(b) Each court of appeals shall consist of the circuit
10 judges of the circuit or of the division in regular active serv-
11 ice. The circuit justice and justices or judges designated shall
12 be competent to sit as judges of the court.”

13 SEC. 9. Section 44 (a) of title 28, United States Code,
14 is amended to read in part as follows:

15 “(a) The President shall appoint, by and with the ad-
16 vice and consent of the Senate, circuit judges for the several
17 circuits as follows:

“Circuits						Number of Judges
*	*	*	*	*	*	*
“Fifth:						
Eastern Division-----						12
Western Division-----						11
*	*	*	*	*	*	*
“Ninth:						
Northern Division-----						9
Southern Division-----						11”.
*	*	*	*	*	*	*

18 SEC. 10. Section 45 of title 28, United States Code, is
19 amended in part as follows:

(a) At the end of the first sentence of subsection (a) delete the period and insert the words “or division.”

(b) At the end of subsection (b) delete the period and insert the words “or division.”

(c) In subsection (d) after the words “present in the circuit” insert the words “or division.”

SEC. 11. Section 46 of title 28, United States Code, is amended to read as follows:

“§ 46. Assignment of judges; panels; hearings; quorum

“(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

“(b) In each circuit or division the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs.

“(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit or division who are in regular active service. A court en banc shall consist of all circuit judges of the circuit or division in regular active service. A circuit judge of the circuit or division who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehear-

1 ing of a case or controversy if he sat in the court or panel
2 at the original hearing thereof.

3 “(d) (1) In any circuit consisting of two divisions,
4 each of which has jurisdiction over cases arising from a
5 United States district court sitting in a single State, the
6 senior chief judge of the two divisions, upon certification
7 or petition as hereinafter specified, shall convene a joint
8 en banc panel consisting of the four most senior judges in
9 regular active service in each division, excepting therefrom
10 the senior chief judge who shall sit and preside ex officio
11 on the joint en banc panel.

12 “(2) The joint en banc panel shall have only the juris-
13 diction specified in section 1291 (b) of this title. Such juris-
14 diction shall be invoked (1) upon certification by one of the
15 divisions of that circuit that a conflict of opinion, as specified
16 in section 1291 (b) of this title, exists between the divisions
17 of that circuit or (2) upon a petition of a party, served upon
18 all adverse parties within the time provided herein, suggest-
19 ing the existence of a conflict of opinion as specified in section
20 1291 (b) of this title. The certification or the petition shall
21 be filed with the designated clerk of the joint en banc panel
22 within ten days after service of the notice of the entry of
23 judgment by the division. The record before the joint en banc
24 panel shall consist of the record and appendix to the briefs as
25 submitted to the division together with such concise state-

1 ment of the case and issue presented for review as may be
2 contained in the petition or in the supplemental briefs of the
3 parties as may be authorized in special rules promulgated by
4 the joint en banc panel governing the procedure for joint en
5 banc review of cases specified in section 1291 (b) of this title.
6 A majority of the judges serving on the joint en banc panel
7 may order that the matter be heard and decided by the joint
8 en banc panel, with or without oral argument. The designated
9 clerk of the joint en banc panel shall perform all duties pre-
10 scribed by law or rules of court as the same may be appli-
11 cable to matters considered by the joint en banc panel.

12 “(e) A majority of the number of judges authorized to
13 constitute a court or panel thereof, as provided in paragraph
14 (c), shall constitute a quorum.”

15 SEC. 12. Section 291 of title 28, United States Code,
16 is amended to read in part as follows:

17 “(a) The Chief Justice of the United States may desig-
18 nate and assign temporarily any circuit judge to act as circuit
19 judge in another circuit or division upon presentation of a
20 certificate of necessity by the chief judge or circuit justice
21 of the circuit or division where the need arises: *Provided,*
22 *however,* That within a circuit consisting of two or more
23 divisions the chief judge of the division who is senior in
24 service may designate and assign temporarily any circuit

judge from one division to act as a circuit judge in the other division upon presentation of a certificate of availability by the chief judge of the division from which the circuit judge is assigned.

* * * * *

“(c) The chief judge of a circuit or division or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit or division, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit or division.”

SEC. 13. Section 292 of title 28, United States Code, is amended to read in part as follows:

“(a) The chief judge of a circuit or division may designate and assign one or more district judges within the circuit or division to sit upon the court of appeals or a panel thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit or division.

“(b) The chief judge of a circuit or division may, in the public interest, designate and assign temporarily any district judge of the circuit or division to hold a district court in any district within the circuit or division: *Provided, however*, That within a circuit consisting of two or more divisions the

1 chief judge of a division who is senior in service may designate and assign temporarily a district judge from one division to hold a district court in another division of the same circuit, upon presentation of a certificate of availability by the chief judge of the division from which the district judge is assigned."

* * * * *

7 SEC. 14. Section 293 of title 78, United States Code, is amended to read in part as follows:

9 " (a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit or division, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit or division wherein the need arises.

19 " (b) The Chief Justice of the United States may designate and assign temporarily any judge of the Customs Court to perform judicial duties in a district court in any circuit or division upon presentation of a certificate of necessity by the

1 chief judge or circuit justice of the circuit or division wherein
 2 the need arises.”

* * * * *

3 SEC. 15. Section 294 of title 28, United States Code,
 4 is amended to read in part as follows:

5 “(a) Any retired Chief Justice of the United States or
 6 Associate Justice of the Supreme Court may be designated
 7 and assigned by the Chief Justice of the United States to
 8 perform such judicial duties in any circuit or division in-
 9 cluding those of a circuit justice, as he is willing to undertake.

* * * * *

10 “(c) Any retired circuit or district judge may be desig-
 11 nated and assigned by the chief judge or judicial council of
 12 his circuit to perform such judicial duties within the circuit
 13 or division as he is willing and able to undertake. Any other
 14 retired judge of the United States may be designated and
 15 assigned by the chief judge of his court to perform such
 16 judicial duties in such court as he is willing and able to
 17 undertake.

18 “(d) The Chief Justice of the United States shall main-
 19 tain a roster of retired judges of the United States who are
 20 willing and able to undertake special judicial duties from
 21 time to time outside their own circuit or division, in the case
 22 of a retired circuit or district judge, or in a court other than

1 their own, in the case of other retired judges, which roster
 2 shall be known as the roster of senior judges. Any such re-
 3 tired judge of the United States may be designated and
 4 assigned by the Chief Justice to perform such judicial duties
 5 as he is willing and able to undertake in a court outside his
 6 own circuit or division, in the case of a retired circuit or
 7 district judge, or in a court other than his own, in the case
 8 of any other retired judge of the United States. Such desig-
 9 nation and assignment to a court of appeals or district court
 10 shall be made upon the presentation of a certificate of neces-
 11 sity by the chief judge or circuit justice of the circuit or
 12 division wherein the need arises and to any other court of
 13 the United States upon the presentation of a certificate of
 14 necessity by the chief judge of such court. No such designa-
 15 tion or assignment shall be made to the Supreme Court.”

* * * * *

16 SEC. 16. Section 295 of title 28, United States Code,
 17 is amended to read in part as follows:

18 “No designation and assignment of a circuit or district
 19 judge in active service shall be made without the consent of
 20 the chief judge or judicial council of the circuit or division
 21 from which the judge is to be designated and assigned. No
 22 designation and assignment of a judge of any other court

1 of the United States in active service shall be made without
2 the consent of the chief judge of such court.”

* * * * *

3 SEC. 17. Section 296 of title 28, United States Code, is
4 amended to read as follows:

5 “A justice or judge shall discharge, during the period of
6 his designation and assignment, all judicial duties for which
7 he is designated and assigned. He may be required to per-
8 form any duty which might be required of a judge of the
9 court or district, circuit, or division to which he is designated
10 and assigned.

11 “Such justice or judge shall have all the powers of a
12 judge of the court, circuit, district, or division to which he
13 is designated and assigned except the power to appoint any
14 person to a statutory position or to designate permanently a
15 depository of funds or a newspaper for publication of legal
16 notices.

17 “A justice or judge who has sat by designation and as-
18 signment in another district, circuit, or division may, not-
19 withstanding his absence from such district, circuit, or di-
20 vision or the expiration of the period of his designation and
21 assignment, decide or join in the decision and final disposi-
22 tion of all matters submitted to him during such period and
23 in the consideration and disposition of applications for rehear-
24 ing or further proceedings in such matters.”

1 SEC. 18. Section 331 of title 28, United States Code, is
2 amended to read in part as follows:

3 “The Chief Justice of the United States shall sum-
4 mon annually the chief judge of each judicial circuit, or
5 division, the chief judge of the Court of Claims, the chief
6 judge of the Court of Customs and Patent Appeals, and a
7 district judge from each judicial circuit or division to a con-
8 ference at such time and place in the United States as he
9 may designate. He shall preside at such conference which
10 shall be known as the Judicial Conference of the United
11 States. Special sessions of the conference may be called by
12 the Chief Justice at such times and places as he may
13 designate.

14 “The district judge to be summoned from each judicial
15 circuit or division shall be chosen by the circuit and district
16 judges of the circuit or division at the annual judicial con-
17 ference of the circuit held pursuant to section 333 of this
18 title and shall serve as a member of the conference for three
19 successive years: *Provided, however,* That upon the effective
20 date of this Act the district judge serving on the Judicial
21 Conference from the fifth or ninth circuits shall continue to
22 represent that division of his circuit wherein he resides until
23 the next judicial conference of his circuit or division at which
24 time each division of the circuit shall choose a district judge
25 to serve on the Judicial Conference of the United States.

1 “If the chief judge of any circuit or division or the
 2 district judge chosen by the judges of the circuit or division
 3 is unable to attend, the Chief Justice may summon any other
 4 circuit or district judge from such circuit or division. If the
 5 chief judge of the Court of Claims and Patent Appeals is
 6 unable to attend, the Chief Justice may summon an associate
 7 judge of such court. Every judge summoned shall attend and,
 8 unless excused by the Chief Justice, shall remain throughout
 9 the sessions of the conference and advise as to the needs of
 10 his circuit or division or court and as to any matters in
 11 respect of which the administration of justice in the courts of
 12 the courts of the United States may be improved.

13 “The conference shall make a comprehensive survey of
 14 the condition of business in the courts of the United States
 15 and prepare plans for assignment of judges to or from cir-
 16 cuits or divisions or districts where necessary, and shall sub-
 17 mit suggestions to the various courts, in the interest of uni-
 18 formity and expedition of business.”

* * * * * *

19 SEC. 19. Section 332 of title 28, United States Code, is
 20 amended to read in part as follows:

21 “(a) The chief judge of each circuit or division shall
 22 call, at least twice in each year and at such places as he may
 23 designate, a council of the circuit judges for the circuit or

1 division, in regular active service, at which he shall preside.
 2 Each circuit judge, unless excused by the chief judge, shall
 3 attend all sessions of the council.

4 “(b) The council shall be known as the judicial council
 5 of the circuit or division.

* * * * *

6 “(d) Each judicial council shall make all necessary
 7 orders for the effective and expeditious administration of the
 8 business of the courts within its circuit or division. The dis-
 9 trict judges shall promptly carry into effect all orders of the
 10 judicial council. In any circuit consisting of two or more
 11 divisions each of which has jurisdiction over cases arising
 12 from a United States district court sitting in a single State,
 13 the senior chief judge, with the concurrence of the chief
 14 judge of the other division, shall select and appoint a joint
 15 committee on rules of procedure from among circuit and
 16 district judges of the divisions, together with representatives
 17 from among attorneys practicing in each division, for the
 18 purpose of achieving relative uniformity in the local rules of
 19 procedure adopted in each division: *Provided, however,* That
 20 the rulemaking authority shall be exercised by the judicial
 21 council of each division.

22 “(e) The judicial council of each circuit or division may
 23 appoint a circuit executive from among persons who shall be

1 certified by the Board of Certification. The circuit executive
 2 shall exercise such administrative powers and perform such
 3 duties as may be delegated to him by the circuit council. The
 4 duties delegated to the circuit executive of each circuit or
 5 division may include but need not be limited to:

6 “(1) Exercising administrative control of all nonjudi-
 7 cial activities of the court of appeals of the circuit or division
 8 in which he is appointed.

9 “(2) Administering the personnel system of the court
 10 of appeals of the circuit or division.

11 “(3) Administering the budget of the court of appeals
 12 of the circuit or division.

* * * * *

13 “(6) Conducting studies relating to the business and
 14 administration of the courts within the circuit or division
 15 and preparing appropriate recommendations and reports to
 16 the chief judge, the circuit council, and the Judicial Con-
 17 ference.

* * * * *

18 “(8) Representing the circuit or division as its liaison
 19 to the courts of the various States in which the circuit is
 20 located, the marshall's office, State and local bar associations,
 21 civic groups, news media, and other private and public

1 groups having a reasonable interest in the administration of
2 the circuit or division.

3 “(9) Arranging and attending meetings of the judges of
4 the circuit or division and of the circuit council, including
5 preparing the agenda and serving as secretary in all such
6 meetings.

7 “(10) Preparing an annual report to the circuit or di-
8 vision and to the Administrative Office of the United States
9 Courts for the preceding calendar year, including recom-
10 mendations for more expeditious disposition of the business
11 of the circuit or division.

12 “All duties delegated to the circuit executive shall be
13 subject to the general supervision of the chief judge of the
14 circuit or division.

15 “(f) * * *

16 “The circuit executive shall serve at the pleasure of the
17 judicial council of the circuit or division.”

* * * * *

18 SEC. 20. Section 333 of title 28, United States Code,
19 is amended to read as follows:

20 **“§ 333. Judicial conferences of circuits**

21 “The chief judge of each circuit or division shall summon
22 annually the circuit and district judges of the circuit or

1 division, in active service to a conference at a time and
2 place that he designates, for the purpose of considering the
3 business of the courts and advising means of improving the
4 administration of justice within such circuit or division. He
5 shall preside at such conference, which shall be known
6 as the Judicial Conference of the circuit or division. The
7 judges of the United States District Court for the District
8 of the Canal Zone, the District Court of Guam, and the
9 District Court of the Virgin Islands shall also be summoned
10 annually to the conferences of their respective circuits or
11 divisions.

12 “Every judge summoned shall attend, and unless ex-
13 cused by the chief judge, shall remain throughout the
14 conference.

15 “The court of appeals for each circuit or division shall
16 provide by its rules for representation and active participation
17 at such conference by members of the bar of such circuit or
18 division.

19 “In circuits having two or more divisions an annual
20 judicial conference may be held jointly by the divisions in
21 which event it shall be summoned and presided over jointly
22 by the chief judges of the several divisions.”

23 SEC. 21. Section 334 of title 28, United States Code, is
24 amended by inserting the words “or division” after the words

1 “the chief judge of each circuit” in the second sentence of
2 subsection (a) and in subsection (b).

3 SEC. 22. Section 451 of title 28, United States Code, is
4 amended by inserting the following new paragraph at the
5 end of the section:

6 “The terms ‘judicial circuit,’ ‘circuit court,’ ‘judicial
7 council of the circuit,’ and ‘court of appeals of the appropri-
8 ate circuit’ as used in this title or other titles also mean and
9 relate to a division of a circuit which has two or more divi-
10 sions created pursuant to this Act unless the context in which
11 said term is used necessarily excludes such meaning.”

12 SEC. 23. Section 1297 of title 28, United States Code, is
13 amended to read as follows:

14 **“§ 1294. Circuits in which decisions reviewable**

15 “Appeals from reviewable decisions of the district and
16 territorial courts shall be taken to the courts of appeals as
17 follows:

18 “(1) From a district court of the United States to
19 the court of appeals from the circuit or division, embrac-
20 ing the district;

21 “(2) From the United States District Court for the
22 District of the Canal Zone, to the Court of Appeals for
23 the Fifth Circuit, Eastern Division;

“ (3) From the District Court of the Virgin Islands,
to the Court of Appeals for the Third Circuit; and

“ (4) From the District Court of Guam, to the
Court of Appeals for the Ninth Circuit, Northern
Division.”

SEC. 24. Section 1254 of title 28, United States Code, is
amended in part by changing the first sentence of the section
to read as follows:

“Cases in the courts of appeals, including cases before a
joint en banc panel specified in section 46 of this title, may
be reviewed by the Supreme Court by the following
methods:”.

* * * * *

SEC. 25. Section 1291 of title 28, United States Code,
is amended to read as follows:

**“§ 1291. Final decisions of district courts and of divisions
of some circuit courts**

“(a) The courts of appeals shall have jurisdiction of
appeals from all final decisions of the district courts of the
United States, the United States District Court for the
District of the Canal Zone, the District Court of Guam,
and the District Court of the Virgin Islands, except where
a direct review may be had in the Supreme Court.

1 “(b) In any circuit consisting of two divisions each of
2 which has jurisdiction over cases arising from a district court
3 of the United States sitting in a single State, a joint en banc
4 panel convened as provided in section 46 of this title, shall
5 have jurisdiction over any decision by a division of that
6 circuit which is in conflict with a decision by the other divi-
7 sion of that circuit and affecting the validity, construction, or
8 application of any statute or administrative order, rule,
9 or regulation, State or Federal, which affects personal or
10 property rights in the same State.”

11 SEC. 26. The creation of courts of appeals for the eastern
12 and western divisions of the fifth circuit and for the northern
13 and southern divisions of the ninth circuit including the ex-
14 ercise of jurisdiction conferred by this Act upon those courts
15 shall become effective on January 1, 1976.

PREPARED STATEMENT OF SENATOR LAWTON CHILES

Mr. Chairman, I appreciate the opportunity to file my statement with your Subcommittee today on behalf of S. 729, a bill to improve judicial machinery by reorganizing the fifth and ninth judicial circuits. Florida has a special interest in this legislation as we are part of the fifth circuit.

I understand that during recent years the workload has risen sharply in the ninth circuit. I know for a fact that it has risen in the fifth circuit, and we have been unable to keep current with the mounting caseload.

The Commission on Revision of the Federal Court Appellate System has recommended that both the 5th and the 9th circuits be divided so as to create a new 11th Circuit from the 5th, and a new 12th Circuit from the 9th.

When hearings were held last fall by your Subcommittee on a similar bill, a representative of the Florida Bar testified before you; and now the Florida Bar has recommended that S. 729 in its present form be given favorable consideration.

I hope your Subcommittee will be able to take early action on this measure so that early consideration can be given to it by the Senate and the House. The caseload is increasing daily and some relief is long overdue.

The CHAIRMAN. Senator Hruska, my colleague in arms, it is a pleasure to hear you first.

**STATEMENT OF HON. ROMAN L. HRUSKA, A UNITED STATES
SENATOR FROM THE STATE OF NEBRASKA, CHAIRMAN OF THE
COMMISSION ON REVISION OF THE FEDERAL COURT APPEL-
LATE SYSTEM, ACCOMPANIED BY: PROFESSOR A. LEO LEVIN,
EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FED-
ERAL COURT APPELLATE SYSTEM**

Senator HRUSKA. Thank you very much, Mr. Chairman.

I appear here, as you have indicated, as Chairman of the Commission on Revision of the Federal Court Appellate System, and also as a cosponsor of the bill which was introduced by the Senator from North Dakota, S. 729, which is a bill which would reorganize the fifth and ninth circuits, and provide for additional judgeships in those circuits.

The members of the Commission, Mr. Chairman, again express their belief that "the situation in the fifth and ninth circuits should not be allowed to continue." We are persuaded that S. 729 satisfactorily achieves the objectives sought by the Commission in its report on realignment and we state unequivocally that it is far preferable to doing nothing.

S. 729 provides that both the fifth and ninth circuits shall be constituted of two divisions. Each division is to have its own chief judge, its own circuit executive, and its own judicial council. Nomenclature aside, in the fifth circuit the major difference between the Commission's recommendation and the present bill is that assignment of judges from one division to the other may be accomplished without seeking the approval of the Chief Justice of the United States. Instead, the chief judge who is senior in service is empowered to make interdivisional assignments, subject only to a certificate of availability by the chief judge of the division from which the judge is assigned. In addition, there is explicit

provision that the annual judicial conference may be held jointly by the divisions, in which event it shall be presided over jointly by the two chief judges.

The same distinguishing features are present in the proposal for the division of the ninth circuit. In addition, because two judicial districts of California are allocated to each of the new divisions, provision is made for a joint en banc in limited circumstances. The chief judge who is senior in service is authorized to convene a joint en banc when there is a decision by a division of that circuit which is in conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same State. (S. 729, sec. 5, amending 28 U.S.C. sec. 46.)

A further provision relevant to the ninth circuit may also be noted. It is designed to achieve relative uniformity in the local rules of procedure between divisions which hear appeals from district courts sitting within a single State. Specifically, the bill provides that the senior chief judge, with the concurrence of the chief judge of the other division, shall appoint a joint committee on rules of procedure. The rulemaking authority, however, is explicitly vested in the judicial counsel of each division.

The bill as introduced adopts the geographical division embodied in the Commission's Alternative Recommendation No. 2 concerning the fifth circuit, except for assignment of the Canal Zone to the Eastern rather than the Western division, a change designed to accommodate a more recently expressed preference by the bar of that territory. It adopts the geographical division for the ninth circuit, without change.

In making its recommendations, the Commission had before it statistical data for fiscal year 1973. The data for fiscal year 1974, set forth below, provide no basis whatever for concluding that the urgent need for Congressional action will go away.

I ask, Mr. Chairman, that these statistics be included at this point in the Record.

Senator BURDICK. Without objection.

[The material referred to follows:]

<i>Fifth Circuit</i>	
Eastern Division:	
Florida.....	800
Georgia.....	469
Alabama.....	329
Mississippi.....	133
Total.....	1,731
Western Division:	
Texas.....	1,017
Louisiana.....	534
Canal Zone.....	7
Total.....	1,558

Ninth Circuit

Northern Division:

California (Northern and Eastern).....	584
Alaska.....	31
Washington.....	217
Oregon.....	144
Idaho.....	36
Montana.....	47
Hawaii.....	55
Guam.....	36

Total..... 1, 150

Southern Division:

California (Southern and Central).....	1, 153
Arizona.....	264
Nevada.....	128

Total..... 1, 545

Senator HRUSKA. The Congress in creating the Commission recognized that however exigent the need for realignment, more was required. Accordingly, the governing statute directs the Commission, in the second phase of its work, to study the structure and internal procedures of the Federal Courts of Appeal system and to report its recommendations for such additional changes as may be appropriate. We are presently in the process of preparing that report. However, the members of the Commission wish to emphasize that after extensive study of proposals for change in structure and procedure, we have found nothing that would eliminate the need for the immediate relief which S. 729 would provide litigants in the Fifth and Ninth Circuits.

In making its realignment recommendations the Commission relied not merely on the caseload of each circuit and the undesirability of courts of 13 or 14 judges, but also upon the geographical size of the two circuits. The present ninth circuit covers an enormous territory; it ranges from the Arctic Circle to the Mexican border, from the Sea of Japan to the Missouri River. Because of this great geographical span, judge time must inevitably be lost in travel; records and exhibits must be transported over long distances; conferences of the judges and en banc hearings are more difficult to arrange; and, in general, the centralized administration of a farflung circuit with an immense caseload results in delays and inefficiencies. The fifth circuit, too, extends over a vast area, stretching from the Florida Keys to the New Mexico border. Creation of two independent divisions within these two circuits would do much to solve the geographical problems faced by both judges and litigants. Even more important, it would make a major contribution by creating courts of appropriate size, yet with sufficient capacity to meet the demands of the heavy workload of the present fifth and ninth circuits.

In preparing its Phase II report, the Commission has studied the problems of managing a large circuit. In our view, it is highly undesirable at this time to create a court of as many as 15 judges in either the fifth or the ninth circuit. Moreover, even if it appears

that each division of the fifth and ninth circuits may eventually require more than what we would consider an optimal number of judgeships, it is our considered judgment that it is better to have two such divisions rather than one court of 20 or even 30.

In conclusion, the members of the Commission believe that those considerations which originally led us to recommend circuit realignment are still of sufficient force to make desirable the division of the fifth and ninth circuits, as contained in S. 729, and that the recommendations which result from the second phase of the Commission's work will not reduce the desirability of immediate action on that bill.

Mr. Chairman, I neglected to say at the opening of my remarks that I am accompanied here by our very highly respected Executive Director, Professor A. Leo Levin, for whom all of us have great affection and admiration. He sits here by my side to participate in any colloquy by the chairman or that the chief counsel may desire to have.

Senator BURDICK. The presiding chairman concurs in everything you said about the professor.

Mr. LEVIN. Thank you very much.

Senator BURDICK. Do you have something at this time?

Mr. LEVIN. No.

Senator BURDICK. Well, thank you very much. I think you have put the case solidly before us.

Senator HRUSKA. Thank you.

Senator BURDICK. Very well.

The committee would like to adopt this arrangement this morning if it suits the convenience of the judges. We would like to have the three judges of the fifth circuit appear together and each give their statement and then we can kind of talk about the subject together.

Judge Walter P. Gewin, Judge Bell and Judge Coleman; would you approach the witness table?

STATEMENT OF JUDGE WALTER P. GEWIN, FIFTH CIRCUIT COURT OF APPEALS, TUSCALOOSA, ALA., ACCOMPANIED BY JUDGE GRIFFIN B. BELL, FIFTH CIRCUIT COURT OF APPEALS, ATLANTA GA.; JUDGE JAMES P. COLEMAN, FIFTH CIRCUIT COURT OF APPEALS, ACKERMAN, MISS.

Judge GEWIN. Thank you, Mr. Chairman. The very first thought which I wish to express to this subcommittee, Mr. Chairman, is one of gratitude. The nine judges of the proposed eastern division are sincerely grateful to the subcommittee for its serious and enlightened consideration of the problems of the fifth circuit. We deeply appreciate, Mr. Chairman, your cooperation in arranging for Mr. Westphal, committee counsel, to attend a joint meeting of a committee of judges from the East, and a committee from the West in New Orleans on January 15, 1975. Mr. Westphal was thoroughly informed, fully cooperative and very helpful to both

committees. In addition, we also express our appreciation to the Commission on the Revision of the Federal Court Appellate System and its staff for their thorough and lengthy study of the appellate system of the Federal judiciary and particularly of the consideration given to the Fifth Circuit. Present here today and joining with me in these expressions are Judge Griffin B. Bell of Georgia and Judge James P. Coleman of Mississippi. They will also make statements.

It does not appear to be necessary to restate at this hearing the thoughts which have been fully and completely expressed to the Commission on Revision of the Federal Court Appellate System and to this subcommittee on former occasions by judges of the eastern division. We do here and now reaffirm those statements.

I am authorized to say to you that the nine judges of the eastern division are unanimous in their support of the proposed legislation, S. 729, which is a revision of S. 2990.

We are also pleased to advise the subcommittee that the State bar associations of the States of Georgia, Alabama, Florida, and Mississippi are unanimous in their support of the proposed legislation.

It is a singular and very significant fact, Mr. Chairman, that nine Federal appellate judges and the bar associations of four States are unanimous in their endorsement of the proposed legislation, S. 729. Statements of position by the bar associations of the four States mentioned have been filed or will soon be filed with the subcommittee. Embraced within those associations are persons of varying backgrounds, differing political affiliations, and divergent philosophical views. Notwithstanding these factors, their support is enthusiastic. These facts, in my opinion, support the conclusion that the proposed legislation is for the common good of all who are affected by it.

Within my own knowledge this subcommittee and the Commission on Revision of the Federal Court Appellate Court System have carefully considered the opinions and thoughts of experienced legal scholars throughout the country. The legislation under consideration was not drafted until mature thought and analysis had been given to the opinions of a vast number of people. We are indebted to the subcommittee for its incorporation into the proposed legislation of certain requests made by the judges of the eastern division. We would like to have the record show, Mr. Chairman, that for a substantial period of time prior to this date, the nine fifth circuit judges of the proposed eastern division have been unanimous and unreserved in their endorsement of S. 729, or its equivalent.

Accordingly, we urge early and favorable action on the proposed bill with that degree of speed which is compatible with mature and deliberate consideration of legislation of this importance.

Permit me to express one final thought, Mr. Chairman. From a sentimental and traditional point of view we regret that the cold facts demand a division of the fifth circuit. The 15 active

judges and the 4 senior judges who now serve the United States Court of Appeals for the fifth circuit represent many years of academic and legal training, long and varied experience in the practice of law and many difficult, though pleasant, years in the service of the Federal judicial system. During our period of service as judges we have developed a sincere and abiding friendship and affection for each other. We are determined to maintain those friendships even after the division.

However, the rules of logic, national policy, the high standards set for the Federal judicial system, and the desire to achieve judicial efficiency and to establish justice all demand the enactment of the proposed legislation.

Permit me to say further, Mr. Chairman, that I fully endorse the statement Senator Hruska just gave at this hearing this morning.

If there are any questions, Mr. Chairman, I will be pleased to attempt to answer whatever questions are asked.

Thank you very much.

Senator BURDICK. Thank you, Judge Gewin.

Judge Bell.

Judge BELL. Thank you.

I will follow with a statement, which I will now read.

Senator BURDICK. It will be received, without objection.

Judge BELL. I am a judge of the United States Court of Appeals for the fifth circuit appointed from the State of Georgia. I have been a United States circuit judge and a member of the fifth circuit since October 6, 1961.

I have some familiarity with appellate court administration. I served as chairman of the Committee on Innovation and Development at the Federal judicial center in 1968-1969. I am currently a member of the board of directors of the Federal Center. I am a member of the American Bar Association Commission on Standards of Judicial Administration. I am also a member of the Advisory Council for Appellate Justice, a study group sponsored by the Federal Judicial Center.

I am chairman-elect of the Division of Judicial Administration of the American Bar Association. Coming closer to home, I am and have been chairman of the rules committee of our court for several years and I am familiar with the local rules and particularly those which we have employed in recent years in bringing maximum efficiency to the court.

I testified at some length before the Commission on Revision of the Federal Court Appellate System on September 5, 1973, in Jacksonville, Fla., and that testimony is no doubt available to you. For that reason, I do not expect to testify in any detail today, but to make myself available for questions after a short statement.

During the period of my service on the Fifth Circuit, the court has increased from 9 to 13 and then to 15 judges. Filings have increased by geometric progression and to the point of near inundation—for example, an increase from 2,014 in 1970 to 3,294 in 1974.

The fact that S. 729 substitutes, through division of the circuit, 23 judges for the present 15 points up the problem. We need an additional eight judges in the present circuit. Either the eight will be added making a total of 23 active judges or the circuit must be divided along the line of what S. 729 proposes.

The massive problem of the fifth circuit will not be readily apparent from a comparison of the filings in the 11 circuits. For example, those filings for fiscal year 1974 would indicate that some of the other circuits have workloads approximating that of the fifth on the basis of filings per judgeship, but these are based on raw filings and not on case disposition actually requiring action on the part of the members of the court.

In this connection, I attach as exhibit 1, a table prepared by the chief deputy clerk of our court which adjusts administrative office statistics by what I term the "washout" rate for each circuit. By "washout" is meant those cases as shown on the table which are disposed of without judge activity. It will be noted that this rate runs from a low of 32.7 percent to a high of 57.5 percent and that the fifth circuit rate is 34.8 percent. The last column in that table demonstrates the actual caseload per judge. The load of 144 cases per judge in the fifth circuit is entirely too high, and, in fact, is unreasonable, oppressive, and not in the public interest.

We have used every known method to increase the efficiency of our court. We have developed methods heretofore unknown to the appellate process. Each judge's office is operated on a 12 months' basis. Each member of the court is assisted by more than the ordinary complement of law clerks. Oral argument is denied in more than half the cases which reach the judges for disposition. Orders are used in lieu of opinions in many cases. We receive help from senior judges and from visiting judges.

Despite these efforts which are unusual and perhaps unprecedented, and to some extent only warranted to prevent a crushing backlog, we are now facing a backlog of cases. We have reached and passed the capacity of the court. The longer the Congress delays in providing ample judge power, the greater will be the backlog.

In my judgment, it is imperative that more judges be allocated to the fifth circuit. It is equally imperative that the size of the circuit be reduced. I will not review the many problems involved in maintaining the law of the circuit, and even the court itself, as stable institutions, given the problems which inhere in the large en banc court. Nor will I review again the concept of small group dynamics which results in considerable difficulty in attaining a majority opinion in a large court. A study of small group dynamics will indicate that there may be a group so small that there is not a proper atmosphere for a minority view but, on the other hand, there can be groups of such size that a phenomenon of fragmentation presents itself to the end that it is difficult to obtain a majority view. Absent a majority view, something akin to the legislative process sets in whereunder there is a casting about

amongst the fragmented groups to achieve a majority by compromise.

The only feasible method of reducing the size of the en banc court is to divide the Fifth Circuit.

A division of the circuit will lend itself to better administration of the court from an operational standpoint. In addition, the members of the court will be better able to keep abreast of the large volume of law being written by the court.

As regrettable as it may be, and I bow to none in my pride in the fifth circuit, the old order changeth. The combination of time, cases, and the vicissitudes of an expanding body of law dictates that we must now face circuit division.

I urge prompt action on S. 729 and will be glad to answer questions to the best of my ability.

Thank you, Mr. Chairman.

Senator BURDICK. Thank you, Judge Bell. The exhibit 1 which you referred to will now be placed in the record.

[Exhibit follows:]

EXHIBIT 1 TO JUDGE BELL'S STATEMENT
ADJUSTED FILINGS PER JUDGESHIP—FISCAL YEAR 1974

Circuit	Fiscal year 1974 filings	Adjustment for cases to be disposed of without hearing or submission on briefs ¹	Cases to be disposed after hearing or submission with briefs or merits
1st.....	129	38.6	80
2d.....	200	54.9	90
3d.....	135	42.2	78
4th.....	209	53.5	97
5th.....	220	34.8	144
6th.....	148	44.7	82
7th.....	136	32.7	92
8th.....	124	42.6	72
9th.....	207	41.8	120
10th.....	131	54.0	60
D.C.....	138	57.5	59

¹ Includes cases disposed of: (1) By consolidation or cross appeals; (2) by dismissal by the parties under FRAP 42; (3) by the Clerk for want of prosecution under local rules; and (4) by the judges on such matters as motions of appellee to dismiss, petitions for mandamus, motions for summary affirmance or reversal, and other matters without briefs under FRAP 28.

Source: A.O. Management Statistics—1974.

Judge COLEMAN. Mr. Chairman, I had the privilege and pleasure last September of testifying at considerable length before you, and I have prepared a statement for today, which has been sent to committee counsel—it is in writing. It fairly well parallels what Judge Gewin and Judge Bell have already said.

Attached to it is a letter dated March 4, 1975, from the Mississippi State Bar reaffirming its position on that matter.

To satisfy you, Mr. Chairman, in the interest of time, I would simply like this statement filed and incorporated in the record at this point, or I would be happy to go ahead and state it orally. I do not know what the committee procedure is.

Senator BURDICK. This fits very well with procedure. The whole statement will be made a part of the record, and we are delighted. [The prepared statement of Judge James P. Coleman follows:]

PREPARED STATEMENT OF JAMES P. COLEMAN, JUDGE OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mr. Chairman, and members of the committee: I am here today for the purpose of again stating my support for Senate Bill 729, a bill to improve judicial machinery by reorganizing the Fifth Circuit.

I have read Senator Burdick's statement to the Senate when the bill was introduced on February 18, 1975. I think the statement correctly describes the situation which seriously threatens the effective exercise of the federal appellate process in the six states of the Fifth Circuit.

I have heretofore testified in Jackson, Mississippi, before the Commission on Revision of the Federal Court Appellate System.

On September 25, 1974, I testified here in Washington before the Subcommittee on Improvements in Judicial Machinery. This testimony went into considerable detail. I had the opportunity of answering many questions propounded both by the Committee and its Counsel.

Since my prior testimony is a matter of record, I do not think I should trespass on the time available to the Committee by repeating it a this time. I simply wish to say, and I appreciate the opportunity of saying, that I adhere, without reservation, to the testimony which I have already given.

I would like to emphasize one special point in particular. If we are to maintain appellate procedure in our Circuit as a meaningful process this proposed legislation is absolutely mandatory. By screening appeals, by denying oral argument in more than fifty per cent of our appeals, and by shouldering an almost intolerable workload, the Fifth Circuit has been able to stay abreast of its docket. Now, we find that on July 1, 1975, contrary to what happened last year, we shall have an unsubmitted backlog of about 275 cases. Because of the screening process these will necessarily be difficult cases, cases about which Judges may reasonably differ, and they will require far more than the usually expected time for their disposition. To be more specific, wherein we have heretofore been able to avoid the brink we are now about to be compelled to step off it. Every Judge on our Court has an extreme aversion to requiring litigants to wait indefinitely for the decision of their appeals, especially where they involve human freedom and the right to recover for serious personal injuries, as in the case of Seamen and Longshoremen.

If we could get the extra Judges provided by this legislation and if we could improve the logistics of the decision making process by cutting participation from fifteen Judges back to twelve, as this legislation provides for the Eastern Division of the Fifth Circuit, then we could both promptly and meaningfully dispose of appellate cases in Mississippi, Alabama, Georgia, Florida, and the Canal Zone.

Our Court is now well past "high noon," and I appreciate the efforts of the Congress to remedy the situation.

Mr. Chairman, on September 24, 1974, Mr. James Hugh Ray, President of the Mississippi State Bar, testified before you, here in Washington. At that time he stated the full support of the Mississippi State Bar for the proposed division of the Fifth Circuit. I have with me a letter from Mr. Ray, updating this testimony and indicating that the position of the Mississippi State Bar stands as it was in September. I would like to hand up his letter and ask that it be incorporated as a part of my statement.

Mr. Chairman, with this statement, I shall be delighted to try to answer any questions which the Committee or its Counsel may consider important.

Senator BURDICK. As you said, yourself, Judge Coleman, you all have almost spoken with one voice here this morning.

I have a few questions for all of you.

Gentlemen, at the conclusion of today's hearing I will include in the record of this proceeding various letters and resolutions

from the bar associations of the States of Florida, Georgia, Alabama, and Mississippi which disclose that the bar associations of these four States are unanimous in this legislation. From the testimony which each of you have given today it appears that the nine circuit court judges from these four States, including the three of you, are unanimous in support of this bill. In light of this unanimity, there is no reason for me to subject you gentlemen to additional questioning. However, there are a few questions I have.

According to these statistics, the proposed eastern division, consisting of 12 judges, would have an average caseload of 145 filings per judge. This would compare with the average filings of 220 per judge in fiscal year 1974. Do you feel this is a sufficient lightening of the caseload which is conducive to improving the appellate process in the four states?

Judge GEWIN. Unquestionably so.

Judge BELL. Yes.

Senator BURDICK. With this reduced caseload, do you think it would be possible for the eastern division to grant more oral argument than under existing procedures and manpower in the existing circuit?

Judge GEWIN. Yes, sir.

Senator BURDICK. I assume when one answers yes, and the others do not answer, you all agree?

Judge BELL. In our court, when there is no answer it means yes.

Judge COLEMAN. I think that is the chance to get back to more oral argument. That would save time. A lot of our time in the screening process could be used for more oral argument, if we were in a smaller court with a smaller number of judges operating.

Senator BURDICK. Under section 6, it is contemplated that Atlanta will be the headquarters for the court of appeals. However, because the new Federal Courthouse in Atlanta is in the process of construction, the bill authorizes the eastern division to sit at New Orleans until adequate facilities are available in Atlanta. Have any of you given any consideration as to the mechanics—as to how this housing problem will be solved or how long a time would be involved in using the facilities in New Orleans?

Judge GEWIN. You inquire about the use of the facility in New Orleans? Well, we have come through some pretty rough times. Senator, together. I believe we could live in the same house until we could get new quarters. I realize there would be some mechanical problems. We would have to confer and pick out times when the East would sit and the West would sit.

But on a temporary basis I do not think that would be a serious impediment to our operations.

Judge COLEMAN. I feel also, Mr. Chairman, that there would be no problem.

But there would be no problem in holding court in Montgomery, Jacksonville, Mississippi, and other places east of the river just as we do now.

I am here fresh from a week of court in Jacksonville.

Judge BELL. I might add, the post office is moving out of the Federal Building in Atlanta. Judge Gewin and Judge Morgan met with the spaceman over at the GAO office and we made a great deal of progress in obtaining space in the circuit court in Atlanta that would help within the year.

Judge GEWIN. I might state, Mr. Chairman, we have suggested to GSA that it would suit the eastern division quite well to let us remain in the present building, which is now being used by the district court and the post office, which, as Judge Bell said, will be moving out. We will be happy to remain there and refix that building, and we feel, and I think they feel that substantial savings would be accomplished by keeping us there rather than providing quarters in the new building, which would be certainly at the earliest, 4 or 5 years from now.

Senator BURDICK. As I understand it, there will be no problem about these temporary arrangements?

Judge BELL. Yes, sir.

Senator BURDICK. Do I detect nostalgia about staying around New Orleans?

Judge GEWIN. Yes.

Senator BURDICK. At a meeting on January 15, you and some of your fellow judges suggested to the subcommittee counsel that provisions should be made in the bill for the nomination, confirming, and appointment of new additional judgeships in advance of the effective date on which the two divisions would officially come into existence. My question to you is, have you studied the language to this effect and are you satisfied with that language?

Judge GEWIN. I think it is very good language, Mr. Chairman, but I must say we felt a little reluctance—for judicial officers to suggest what the executive and legislative branches should do and how quickly they should do it. We would be pleased to proceed as indicated in the bill, but we have not presumed to originate that idea because we thought it might be considered somewhat out of our field of activity.

Senator BURDICK. Well, gentlemen, there is such unanimity here I have no further questions, and I appreciate your appearance here this morning.

Excuse me. Staff has a question.

Mr. WESTPHAL. Looking ahead a few moments, I note that your colleague, Judge Wisdom, makes the prediction—well it seems to be a double prediction here—one is a statistical analysis that the caseload is kind of leveling off and there is a projection that the filings in 1975 may be down 2.8 percent from the filings of fiscal 1974. It may be true we will reach a plateau on this so-called law explosion we have had ever since World War II, it seems.

But there is also the prediction made that if the caseload does continue in the future as it has in the past, that the day is not far off when there may have to be 15 judges in each of the two divisions that would be created in the fifth circuit by this bill.

On the other hand, during the various hearings that we have had, there have been discussions of the fact that when a court oper-

ates over a more compact geographical area, that when we have the use of adequate supply of law clerks for the individual judges and have a better central staff operation, that the capacity of a court of given size can be increased.

The chairman has suggested by taking the caseload figures projected in this bill, that you start out with a low caseload of 145 filings per judge and taking into consideration this "washout" rate of some 34 percent, which Judge Bell mentioned, that you are left with a caseload of something like 97 cases per judge, that, through screenings and oral arguments and everything else, will be the effective workload per judge.

Now, can any of you hazard a guess as to what the capacity of your 12-judge court would be and its ability to assimilate a reasonable increase in the caseload that you would be starting out on?

Judge GEWIN. Well, certainly it is obvious that we could do much more about it with the 12 judges with a caseload of 97 than we can now with 15 judges with a caseload of 220.

I have never quite understood the argument, Mr. Chairman, that the problem is so large that to divide it will result in two problems equally as large. The sum of both is bound to demonstrate the fact that we are too large now. This decrease in filings may occur, but it is only a projection. But even so, the problem that will not go away is the backlog.

According to our Chief Deputy, who is considered to be quite a good statistician, in 1975 we will have a backlog of 177 cases; 1976, 288 cases; and 1977, 399 cases.

As to nonpreference cases, that has a significant meaning. For example, at the present time, by the end of this year, there may be in nonpreference cases a lapse of 11 months from the date of the filing of the last brief before hearing, but by January 1977 there will be a lapse of 17 months, and by April 1977 there will be a lapse of 20 months. So even if the filings should drop 2 percent the problem is not solved in any sense.

Judge BELL. I think I could add this, Mr. Westphal, that assuming a caseload of disposition by judges of 97, and I think we can say that over the years we could increase that 97 up to 115, so you are talking about an added capacity of about 200 cases, and at that point something would have to give. You would have to get more judges or divide again under this same concept of east and west. I suppose you would end up with 38 circuits. But you could at least take on 200 more cases, and of course, it is not what each one of those judges can do. That is some part of it, but of course, you have some senior judges and some visiting judges who help out some.

Mr. WESTPHAL. Of course, there is also operative in this situation we are talking about, as we talk about the future, the fact that Congress is considering legislation, for example, to reduce the number of three-judge courts, that efforts are being made to setup administrative procedures for handling complaints arising out of the prisons, so that you would have fewer 1983's. There are

some parts of the country that have already seen a decline in the number of habeas corpus cases.

Judge BELL. Right.

Mr. WESTPHAL. The proposals to limit diversity jurisdiction are still under consideration.

So that there may be things happening to caseloads which would offset what would otherwise be a normal projected input.

Judge GEWIN. One thing just happened, I think, that helps perhaps in a miniscule way, but there is a tendency—I believe legislation has now been adopted which eliminates three-judge courts to review an Interstate Commerce Commission ruling. The effective date does not eliminate two cases I now have. I wish it did, but in the future that will be some help.

I think what you say is important for the reason that not only is a division of the circuit a good remedy, but a limitation on jurisdiction in those areas you have mentioned, diversity, three-judge cases, et cetera—those remedies also are needed in this situation.

Judge BELL. Do not forget that historically when we have an omnibus judges bill, district judges—once those judges take office we have more appeals because each one creates some appeals, so that will add something to the caseload. These others may take it away. I think under S. 729, we can go for a good many years. I think that capacity is built into it so that it would suffice for a good while.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Thank you, gentlemen.

Judge BELL. Thank you very kindly, Mr. Chairman.

Senator BURDICK. Our next witnesses will be the Chief Judge, John R. Brown, Judge John Minor Wisdom, and Judge Thomas G. Gee, of Houston, New Orleans, and Austin, respectively.

We would like to proceed with you gentlemen as we did with the previous witnesses.

STATEMENT OF CHIEF JUDGE JOHN R. BROWN, FIFTH CIRCUIT COURT OF APPEALS, HOUSTON, TEX., ACCOMPANIED BY JUDGE JOHN MINOR WISDOM, FIFTH CIRCUIT COURT OF APPEALS, NEW ORLEANS, LA., AND JUDGE THOMAS G. GEE, FIFTH CIRCUIT COURT OF APPEALS, AUSTIN, TEX.

Judge BROWN. Mr. Chairman, I express my appreciation as the other three judges did for the invitation this committee extends to us. This may be historic because it may be the last time I appear as the Chief Judge of the fifth circuit. There may not be the whole circuit, if this legislation passes.

I can not help but remark what Judge Goldberg has said, there has been more said on splitting the fifth than on splitting the atom, and we are adding to that today.

I want first to tell you that I feel an obligation to keep the committee and the Senate fully informed.

I have, working with the Chief Deputy Clerk, Mr. Ganuchau, some figures prepared. Filings have fallen off about 3 percent. At the same time we are developing a backlog now for the first time

in 10 years, and these sheets show the detail which I will not take time to explain.

Senator BURDICK. Without objection, they will be received.

[The material referred to follows:]

FIFTH CIRCUIT ANALYSIS OF FILINGS, TERMINATIONS, AND PROJECTED BACKLOG,
ETC.—FISCAL YEAR 1975-77

I. FILINGS

The current projections would predict about 3,205 appeals (including cross-appeals), a decline of 89 cases (2.7%) from 3,294 in fiscal year 1974.

A. *Filings*

1st half fiscal year 1975	1556
1st half fiscal year 1974	1540

Increase (1.0 percent)	+16
------------------------	-----

B. *Projected filings*

1st half fiscal year 1975	1556
2d half fiscal year 1975	1556
Plus: Estimated 6 percent increase for 2d half of fiscal year over 1st half	93

Total	3205
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C. *Projected change*

Fiscal year 1975	3205
Fiscal year 1974	3294

Decrease (2.7 percent)	-89
------------------------	-----

D. *Filings needed to reach projection*

Per month

Average filings required January-June	275
Actual filings January and February 1975	275

The filings for the last three years and this year's projection are as follows:

Fiscal year:	<i>Filings</i>
1972	2864
1973	2964
1974	3294
1975 (Projected)	3205

3-year increase 1975 over 1972—341—11.9 percent.

II. TERMINATIONS

A. *All terminations*

1st half fiscal year 1975	1593
1st half fiscal year 1974	1265

Increase (25.9 percent)	+328
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B. *Opinion Output* (excludes cross-appeals)

Fiscal Year (8 mo only):

1975	1344
1974	1126

Increase (19.4 percent)	+218
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III. PENDING CASES

Fiscal Year:

1972	1636
1973	1729
1974	2310
1975 (1st half)	2258

Percentage change:

1975 over 1974 (2.2 percent)	-52
1975 over 1972 (38.0 percent)	+622

**IV. PROJECTION OF AVAILABLE CASES FOR SCREENING, CALENDARING, AND CUMULATIVE BACKLOG—ASSUMING
NO INCREASE IN FILINGS**

	Fiscal year 1975	Fiscal year 1976	Fiscal year 1977
a. Unassigned cases from preceding fiscal year.....	1,341	1,341	1,341
b. Estimated new filings.....	2,905	2,905	2,905
c. Total available cases.....	4,246	4,246	4,246
d. 44.6 percent of total available cases transmitted for screening.....	1,893	1,893	1,893
e. Cases available for screening.....	1,893	1,893	1,893
f. Less 53 percent summary II's.....	1,003	1,003	1,003
g. Balance for hearing calendar.....	890	890	890
h. Plus III's and IV's from prior fiscal year not heard.....	211	322	433
i. Less cases readied after cutoff date of May 1 (2/12th of Line (g)).....	1,101 145	1,212 145	1,323 145
j. Cases to be calendared to keep current.....	956	1,067	1,178
k. Less cases actually to be calendared (41 wks X 19 cases per week ¹).....	779	779	779
l. Backlog by cutoff date.....	177	288	399
m. Cases readied after cutoff date (Line (i)).....	145	145	145
n. Ready cases for oral argument carried forward to next fiscal year.....	322	433	544

¹ An average of one case per court week is continued for reassignment resulting in an average of 19 cases per week being heard.

V. IMPACT OF BACKLOG ON NONPREFERENCE CASES

	Fiscal year 1975	Fiscal year 1976	Fiscal year 1977
Cases to be calendared to keep current (Line (j) table IV).....	956	1067	1178
Less cases which can be heard:			
a. Preference cases ¹	397	397	397
b. Nonpreference cases ²	382	779	779
Backlog (nonpreference cases classified for argument not reached).....	177	288	399

¹ 46.9 percent of cases available for screening.

² Difference between 397 preference cases and 779 maximum caseload on oral argument of 41 weeks at 19 cases per week.

VI. PROJECTED HEARING DATES FOR NONPREFERENCE CASES BRIEFED FROM DECEMBER 1974 THROUGH MAY 1, 1977, ASSUMING NO INCREASE IN FILINGS

Last brief filed in—	Case will be heard in—	Months from last brief to hearing
December 1974.....	October 1975.....	11
January 1975.....	November.....	11
February.....	December.....	11
March.....	January 1976.....	11
April.....	February.....	11
May.....	March.....	11
June.....	April.....	11
July.....	May.....	11
August.....	June.....	14
September.....	October.....	14
October.....	November.....	14
November.....	December.....	14
December.....	January 1977.....	14
January 1976.....	February.....	14
February.....	March.....	14
March.....	April.....	14
April.....	May.....	14
May.....	June.....	14
June.....	October.....	17
July.....	November.....	17
August.....	December.....	17
September.....	January 1978.....	17
October.....	February.....	17
November.....	March.....	17
December.....	April.....	17
January 1977.....	May.....	17
February.....	June.....	17
March.....	October.....	20
April (Cutoff date of May 1).....	November.....	20

VII. FIFTH CIRCUIT CALENDARING PRIORITIES

Preference cases

Criminal Appeals (Rule 45(b) FRAP).

Appeals from orders refusing or imposing conditions of release.

Difficult or widely publicized trials.

Organized Crime Control Act.

Selective Service Criminal Cases.

Habeas Corpus and Section 2255 Appeals.

Interlocutory Appeals.

National Labor Relations Board.

Immigration & Naturalization Appeals.

Administrative Orders, Review Act of 1966.

Federal Trade Commission Act.

Mandamus, Prohibition, Etc.

Certain Federal Questions.

Social Security Appeals.

Railroad Unemployment Ins. Act.

Norris-LaGuardia Act.

Clayton Antitrust Act.

Nonpreference cases

United States Plaintiff: Negotiable Instruments; Other Contract Actions; Condemnation of Land; Other Real Property Actions; Personal Property Tort Actions; Civil Rights; Fair Labor Standards Act; Labor Management Relations Act; Securities, Commodities and Exchanges; and Tax Suits.

United States Defendant: Contract Actions; Real Property Actions; Tort Actions; Selective Service Act; and Tax Suits.

Federal Question: Marine Contract; Other Contract Actions; Employers Liability Act; Marine Injury; Other Tort Actions; Civil Rights; Labor Management Relations Act; Labor Management Reporting and Disclosure Act; Patent; and Securities, Commodities & Exch.

Diversity of Citizenship: Insurance; Other Contract Actions; Real Property Actions; Personal Injury—Motor Vehicle; Personal Injury—Other; and Other Tort Actions.

Judge BROWN. What is going to happen in terms of delay? We will be faced, perhaps, with a situation that has confronted the ninth circuit, where, when they hear the case orally, the briefs are 20 months old, and that is a deplorable condition.

I do not believe, and I am basing this on my experience, that this year we will have an increase. I think we will have leveled off this year. But I predict as I did before, there will be increases over the next two or three years. This exhibit is prepared on the assumption there will be no increase in filings. It still presents a problem.

Now, some mechanical things. On the use of the New Orleans Courthouse, we now pay rent to GSA. Maybe we can collect rent from the eastern division, to soften the blow to our own budget. I think we will have no real difficulty on that score. We will have some mechanical problems on where we can house the five new judges we will get in the western division, since we now have chambers for 15 plus 3 visiting judges.

Senator BURDICK. Well, Judge, if it will be helpful, I will offer my services as an arbitrator.

Judge BROWN. That will be fine, because we welcome an opportunity to appear before you. We regret you had to send only your counsel down to a meeting in New Orleans, since you were out in North Dakota, at the time we talked about it.

I think there are some technical problems here.

On the assumption the Congress passes the bill—a thing I earnestly hope never happens—in substantially this form, which is to say by creation of the divisions in the Fifth and Ninth Cir-

suit, there is a need for some corrective language in the bill. As it is now written and revised, it assures the cross-assignment of both active district judges to district court from one division to another, circuit judges from one Court of Appeals to another, and active circuit judges to districts in the divisions. That is taken care of by the bill.

Having worked with my circuit executive this past week, we prepared an analysis, and it is included in this memorandum of March 13, copies of which we sent to Mr. Westphal, and we talked to Mr. Weller on Thursday or Friday.

Left out inadvertently, because I remember at a meeting in New Orleans Mr. Westphal and I discovered after the meeting had broken up we had not adequately taken care of cross assignment to senior circuit judges or senior district judges, either to the district courts of the other divisions, or more importantly, to the circuit court, because we followed the policy the last four or five years of using only senior district judges on the Court of Appeals. Some of our most outstanding judges are in that category.

So we proposed on page 2 of this memoranda a new paragraph C to section 15.

I reread this thing, and this is a little technical, but the way it is now drafted, it calls for the senior of the two circuit chief judges to assign any retired circuit or district judge to either one of the two divisions. I think since the present statute is on this sort of a structure, namely, that the chief judge of the circuit from which the judge is coming has nothing at all to say about the assignment of a retired circuit or district judge from outside to another circuit, that this language ought to be changed so that it would provide that the chief judge of either of the divisions may assign a retired circuit or district judge to such duties as such senior judge is willing to undertake. You can see sort of a ludicrous situation. Suppose Judge Ingraham, who is a senior judge and lives in the Western division, and suppose he is to be assigned to the Eastern division Court of Appeals. I would have to assign a judge in the Eastern division Court of Appeals. It ought to be Judge Gewin who would be the chief judge of that circuit. So I could show Mr. Westphal some precise language when we adjourn that might well accomplish that.

Then we uncovered another thing that does pose a policy question, and on which our two Committees never had any discussion, and that is set forth on the bottom of that page, and that is with respect to en banc. At the present time, when a senior circuit judge of the circuit sits on a panel, he is automatically on the en banc court when it is reheard en banc. Now, it seems to me that the same thing should be true in the case of a cross assignment of a retired circuit judge from one division to the other division. Suppose Judge Tuttle in the Eastern division is assigned to a panel in the Western division, and the case goes en banc later, he would be automatically on the en banc court. This does pose some policy questions that the Congress may want to consider.

I cannot speak for anybody but myself on that particular affair.

But I do think it is important, and as you know, the Committee report on page 16 states the positive commitment of cross assignments without the necessity of going through the Chief Justice. My suggestions here are merely to bring the language of the bill into conformity with the policy which you have adopted.

Now, as far as the substance of the thing is concerned, I align myself with Judge Wisdom and Judge Gee, but I have a slight question with Judge Gee on en banc, but slight. I will not go through the things they have so ably stated before, and now state in their filed statements.

I do not believe this is a solution the Committee has found, because this is a split in everything but name. You have two independent courts, they are supposed to operate independently from a judicial and administrative standpoint, so that once you approach it that way it seems to me that you are just simply dividing another circuit when it gets to the point where that has to be divided—

Senator BURDICK. Judge, may I give you an analogy that you might think about?

Judge BROWN. All right.

Senator BURDICK. North Dakota for a number of years had two Congressmen at large, and they were pretty well devoted to the whole state of North Dakota, and then they split it into eastern and western districts and we still had the comradery and the interests of the State at heart, and unanimity.

Judge BROWN. I suspect there will be physiological or emotional values in this, but it does soften the blow a little bit that each of us can bear the name Fifth and we each would like to have it and understand why the others would, too.

But I really do not think from a substantive standpoint you are really solving anything, because if you apply this to the Third or Sixth Circuit you are doing what you have to do in the event of a split.

My own personal view is, and on this the judges from the West have not any firm unanimous policy at all, but my own view is it would be preferable if there were an outright split if this thing has to go through.

That brings me, then, to the effective date of the bill. It is the view of many of us in the West, and I know I speak for Judge Goldberg very emphatically, but he thinks the effective date of the bill ought to be the date on which the new judges are in their seats. That poses some mechanical problems that are not easy, and I must say we are indebted to Mr. Westphal's presence in New Orleans and his working on the present section. I believe it is section 5, because if that is adopted I think the language is adequate to carry that out.

But let me point out why this does not really meet the problem. The moment the act becomes effective, now January 1, 1975, they have to use cross assignments. You have the gentlemen from the East; what will we do about oral argument? Until the new judges are appointed, neither of the two subdivisions can really effectively

change its operating rules. To be more specific, if they are going to help us on cross assignments, and they pledge to do it, and we honor that pledge, we cannot change their rules on screening. We will have to almost retain our present practices so that to that extent, at least, the courts are something less than independent.

So I think it would be a more positive thing to put the new concept into operation at the time when the resources are available and it ought not to be done prior to that time.

Senator BURDICK. You ought to understand we cannot control the President.

Judge BROWN. I do not think so, and the judges cannot control either the Congress or the President. We have enough trouble controlling the judges.

Whether this language that is in the revised bill will be effective, I do not know, but it is better than it was before.

Now, on the merits, I am sure Judge Wisdom will emphasize this a great deal—as we told you last year, we had instituted a new staff attorney setup in which we had five very fine lawyers with an adequate secretarial staff in addition to the pro se clerks in the clerk's office. That has been a very effective thing, just 9 months experience with it. We are 200 opinions ahead of last year, same time. That is pretty remarkable. We are turning out opinions at a faster rate than we did a year ago and nibbling always at that pending caseload. So this is another thing that ought to be given a real adequate trial experience before we cut this whole thing up.

Mr. WESTPHAL. Excuse me, Judge.

You say you were 200 opinions ahead or 200 dispositions?

Judge BROWN. These are 200 opinions ahead.

Now, you understand that this covers the rule 21's and the signed opinions. I can give you—as a matter of fact, I will leave with you the score sheet, which does not identify the judges by name, which shows an actual breakdown in contrast to last year. It is 200 cases. You can see that represents almost what—we have 32 percent washout, so we have done pretty well.

Now, I suppose we have enough problems in the fifth circuit without trying to offer any advice about the ninth circuit. But I have a role here as a member of the Judicial Conference of the United States, and I think you ought to take a close look at the way you worded arrangements for what I call the mini banc, that 4-1-4 court on California problems. Specifically where the judiciary will have troubles about it, is that it seems to me to require that the en banc court be convened on either one of two conditions: (1) By a certificate by a division; or (2) by petition of a party. That goes farther than rule 35, which allows the parties really to say nothing about it.

I know Mr. Westphal brought this up before the judges' meetings in New Orleans just for our reactions, and I hope you do not resent the fact that I am going to the west coast to tell them how to handle it.

That is all I have to say.

Once again, my thanks. Judge Wisdom will be next.

STATEMENT OF JOHN MINOR WISDOM, JUDGE, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Judge WISDOM. Mr. Chairman, thank you for giving me the opportunity of expressing my disapproval of S. 729.

I have been on the fifth circuit for almost 18 years. I have testified before this committee and before the Hruska Commission and in each instance submitted prepared statements. I shall, therefore, not attempt to repeat specific recommendations I made or go into discussion of specific matters, such as the advantages of a central staff.

But I do feel it is appropriate and necessary for me to restate my basic position. My basic position is that this bill does not get to the roots of the problem. The roots are these: There are too many cases that should not be in the Federal courts. The input must be reduced.

Second: If the Federal appellate system creaks it must be restructured.

Third: Federal internal practices and procedures are in the grip of a dead hand and they must be reformed and made more efficient. I shall not go into specific suggestions as I did in my prepared statements.

Basically, I feel strongly that this bill may trigger a proliferation of circuits.

Here I repeat myself, but I think it is important enough to be repeated. This bill may trigger a proliferation of circuits that will dilute the role of Federal courts in our brand of American federalism.

What makes our system work is Federal legal supremacy, and this means the U.S. Court of Appeals has a federalizing function as well as a purely appellate function of reviewing errors.

We are exposed to areas of conflict of the most sensitive and difficult kind where there are local pressures and influences almost impossible to resist, especially on the part of some low courts. Certainly, the narrower the base, the less the incentive of inferior Federal courts to bring local policy in line with national policy.

I say the federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it would be difficult for that court to resist completely, as it must, the pressure of local interests. The best exercise of such a high role would call ideally for a court consisting of judges with widely different backgrounds who are familiar with regional or local thinking but insulated from the influences of the region and the community. A court of 15 judges, such as we have now, who reside in 13 different areas, large and small cities, from six States, is as well insulated from local pressures as any court of appeals could be. The fifth circuit is well suited as it is now constituted to serve our Federal system.

Now, my objection to your committee report is that it shows no awareness of the advantages to American federalism of having a court drawn from widely different areas. On the contrary, Texas and Louisiana are to be joined in one circuit. Why? I quote from

the committee print: "Because these two States have a civil law background springing from the Napoleonic code." This will come as a surprise to Texans. Texas has no civil code, and its law is not based on the Code Napoleon. Georgia, however, has a civil code, and has had it for over 100 years. The historical error is unimportant. What is important is the narrow view of the Federal system which the error exposes. Texas and Louisiana share common interests in oil and gas; Georgia has no oil and gas. In an oil and gas case, is it better to have the matter settled by a court composed entirely of Texas and Louisiana judges or to have on the court a judge from Georgia, and the court cross-pollinated with judges from six States?

That is why I oppose this bill on theory.

But I think the bill rests on internal inconsistencies. The committee print recognizes, and I quote: "Creation of new circuits is not a solution," yet this bill would create two new circuits. I regard a division as set up in the bill as autonomous and in effect a new circuit, although I would rather have our court be called a western division of the fifth circuit than the twelfth circuit.

Now, the committee states in its report, and I quote, "The second, third, and sixth circuits could be prime candidates for division in the near future if their respective caseloads continue to increase. . . . Today we are asked to bring the number of circuits to 13, tomorrow it may be 15 or 16. By 1990 the Nation may well need 27 circuits if nine is the magic number of judges". I say it is regardless of whether it is 9 or 15.

You say, and I think it is true, that "it would be impossible to always have at least three States in a circuit." Yet your bill calls for a circuit of two States, though the Hruska Commission itself recognized that a circuit of two States was really unwise.

The committee demonstrates that it realizes the horrors of yielding to proliferation of circuits by pointing out that, in time, California might constitute one circuit which would present the same problem that the whole ninth circuit does now. The bill increases the opportunity for intercircuit conflicts by increasing the number of circuits to 13.

The committee concludes, that the "fundamental and basic solution to increased caseload continues to be increased judges". With deference, I suggest that this is no solution. The committee has already discovered in 1 year that the two nine-judge courts which the Hruska Commission recommended could not handle the caseload for the fifth circuit. The bill, therefore, recommends "23 judges at a minimum". I predict that by the time this bill becomes law and the additional judges take office, should that unhappy event occur, each of the two divisions will require a court of at least 15 judges. We will then be back to where we are now, so far as the argument of having a court of 15 is concerned.

It is true that our caseload is temporarily levelling off. That always takes place about 4 years after new district judges take office. The fifth circuit received 13 additional district judges in 1962, 14 in 1966, and 18 in 1970, or about a 25-percent increase every 4 years from 1962 to 1970. In 1974 the Judicial Conference of the United States recommended 22 additional district judges for the fifth

circuit. The Judiciary Committee cut that number down to 11. Those recommendations were based on fiscal year 1973 statistics and projections made in 1974. They do not take into account the compelling need for more district judges that the Speedy Trial Act will require. Right now, it is virtually impossible for trial judges in overcrowded districts to comply with the relatively easy time limits of the district court plans devised for expediting criminal trials. Literal compliance with the statutory plan when it becomes fully effective in 1979 will mean that no civil cases will be tried in many districts—unless the number of trial judges is substantially increased. My estimate is that this circuit will need not the 22 district judges recommended by the Conference, but at least 40 judges—before the act becomes fully effective. One can safely say that the Speedy Trial Act renders all existing statistical projections obsolete.

Let us assume, however, that only 22 additional district judges will be authorized for the fifth circuit. Each new judge will generate about 40 appeals. That means 920 new appeals. Forty new district judges will generate 1,600 appeals. These figures do not include an annual growth factor of 5 percent.

I say to you, therefore, that increasing the judicial manpower is not the problem. We have got to get to the roots of the problem. Proliferating circuits to add judges is not the solution to the problem.

What S. 729 does is to commit irreversible harm to the fifth circuit without providing even the breathing spell for a period of years that our judges need and ninth circuit judges need, and let us not forget civil litigants as well as criminal litigants.

Senator Burdick put his finger on the solution in 1971. In 1971 when you introduced Senate Joint Resolution 122 to create a commission on revision of the Federal appellate system this is what you said. "While it is apparent that a solution, other than pure manpower increases must be found, there is respectable opinion that realignment of the circuits, involving redistribution of the caseload to courts of appeals"—The benefits of such a realignment may last only until the caseload increases to a point beyond the capacity of the revised courts." I say to you that we will have that within a matter of a few years if the Speedy Trial Act is at work. "Legal scholars in recent years have suggested that a relatively permanent solution to the problems of increased appellate caseload can be found only if the appellate court system itself is redesigned or restructured."

I do not criticize the Congress for creating new causes of action. With all due deference, it seems to me that the report sets up a straw man when it talks about objections to Congress creating new causes of action.

Mr. Justice Frankfurter wrote in 1928:

Whatever our (political) preferences, the complexities and interdependence of modern society are bound to throw upon the federal courts increasing burdens of litigation affecting federal rights . . . Whether national responsibility or state rights were the accent in speech, the administrations of Theodore Roosevelt, Taft, Wilson, and Coolidge alike have contributed heavily to the growth of federal authority. This has had its reflex in federal litigation. The process will not stop.

In the 47 years since 1928, expanding Federal legislation and the resulting expansion of Federal authority have accelerated at a pace that would have left Theodore Roosevelt, Taft, Wilson, and Coolidge panting for breath. This was in the cards when the U.S. Constitution replaced the Articles of Confederation. The accelerated increase in Federal question cases along with insubstantial appeals in criminal appeals and prisoner cases argue strongly for congressional reform of the Federal court system before the Congress dismembers the system by division, subdivision, and sub-subdivision of the circuits.

I have here a certified copy of a resolution of the Louisiana Bar Association. It "strongly urges that the said Commission revise such recommendation so that it finally reports that the geographical limits of the fifth circuit as presently constituted, and in the alternative, that Mississippi be included in a circuit with Louisiana and Texas."

Now, just a word more, and that is really in answer to something that has been said here today.

We have a small backlog—we are sitting only 7 weeks, and we sit 4 days a week. A week is 4 days, and we hear 20 cases. If we sat 8 weeks and sat 5 days and heard 25 cases we would not have a backlog, and I do not think we would be killing ourselves if we did that, either.

I think, too, that we have been resistant to using district judges and judges from other circuits because the lawyers have not liked it. Only 13 percent of our judges were senior judges or district judges or judges from out of the circuit. They used 41 percent in the second circuit. Perhaps there is a place there for us to look for further help.

Judge Brown does not mean to, but he seems to talk as if this bill is positively going to become law. I sincerely hope it will not become law, because I think it will do serious damage to our Federal system.

Thank you.

The CHAIRMAN. Thank you, Judge Wisdom.

Judge BROWN. Judge Gee of Austin, Tex.

The CHAIRMAN. Welcome to the committee.

Judge GEE. Thank you, Mr. Chairman. I am the one that the Secretary called the baby judge.

Judge Green said somewhere in one of his books even in the most perfect love one tries to love more than the other. It appears that the western division loves the eastern division more than the eastern division loves the western division, because most of the opposition seems to come from us.

I cannot add a great amount to what has been said. In fact, I probably cannot add anything except maybe something that comes from my particular situation.

I am just not quite 2 years on the bench, and I was an active practicing trial lawyer before I went on the bench.

I want to say that from the personal point of view of workload, our workload is heavy, but it is far from crushing. I was working harder in the practice in one sense, that is that I had far less control over my work than we have.

I could sum it all up in saying that judges do not have the emergency that lawyers have. You are seldom called at midnight by a client who is in jail and wants you to come down and get him out. Further, they never start court without you, you do not have to send bills and various other good things.

So although we do have a heavy workload, in my judgment there are lots of lawyers who are working just as hard as we are, probably most of the able and active lawyers.

Our present situation in the circuit, I say amen to what Judge Wisdom said. I realize I am one of the younger judges. I do not sit on as many committees and things like that as the more experienced judges do. About all I do is get ready to hear cases and write opinions. So perhaps the work seems to me a little bit lighter than it does to one of these men on the bench longer, and also I am younger and I suppose I have a little more endurance than some of the older people.

But we can sit another week in the year. We can sit another 2 weeks in the year. I would be willing to sit quite a bit more, and think I could if necessary in order to get rid of this backlog.

Presently, we have not really a backlog anyhow. It is sufficiently small that we could wipe it out by sitting once or twice more in the year. I do not think that is worthy of the legislation you are to notice. There are even some advantages to having a small backlog. It permits you to schedule similar cases for argument together, as long as the backlog does not get large enough so that the litigants are substantially delayed.

Well, it seems to me obvious that where you have a good functioning organization like the fifth circuit you ought not to disturb it unless it is necessary. That has weathered a lot of storms. Some of the storms that have beat on it in recent years have been storms indeed, probably more than any other circuit in the country. The fifth has been hammered but it has apparently withstood the hammering and come through with pride and respect. I think, of all the lawyers of the bars of which it is composed. I do not think we ought to tamper with it unless we have to.

If I could be persuaded, Mr. Chairman, that what is being proposed would be a solution, that it would solve our problems, even on a temporary basis, long-term, temporary basis, 15, 20 years, then I might be able to swallow hard and say well, if you have to do it, do it. But I think it is increasingly apparent that the tide of events has washed over the proposed solution. It was washed over even when the Speedy Trial Act was passed. With the passage of that, Mr. Chairman, this is a solution that has gone down the drain, I most respectfully submit.

Well, what else to do? If we embark on a splitting we are going to wind up with the circuit court for the southern district of Louisiana or for the western district of Texas. If that happens these are circuits courts in name only. They are no longer the thing that we have known as the Federal Circuit Court.

Well, what to do instead? Jurisdiction, the intake is where the attack has to be made, Mr. Chairman. Diversity of jurisdiction is an idea whose time has come and gone. It should be eliminated. At

the time of the Confederacy, some of the soldiers from some of the Southern States refused to swear allegiance to the Confederacy on the ground they had already sworn allegiance to their States. I do not think those views or passions are existent any more. A nonresident can get a fair trial in a State court where he sues a resident defendant these days, and the Federal courts do not need to be burdened with this. Admittedly, it is only about 10 percent or less or a little more of our docket, but it is a very troublesome 10 percent, Mr. Chairman. It requires us to attempt to stay reasonably current with the laws of numerous jurisdictions, which is interesting but burdensome. It is more trouble, in other words, than the mere 10 percent figure.

Next, we ought to abolish the three-judge court. It is a poor arrangement. It was a good idea, an excellent idea, but it has not worked out in practice, the reason being that the judges are taking time away from their regular work to do this, tremendous pressure is put on litigants to reduce things to affidavit form and stipulate and so forth. The three-judge courts often do not hear testimony in making their decisions.

So in fact, rather than having a better tribunal to hear these more important cases, you have a worse one. It would be far better to have these important cases heard in the regular way.

We ought to abolish rehearings and let the court initiate its own en banc. A rehearing accomplishes very little, very little. About all they are—they serve about the same function as saying “note our exception” used to—kind of gives the lawyer a chance to blow off sometimes and say something back to the court.

We ought to try to do something with the habeas corpus, the collateral attack. If I had my way I would attempt to limit these people, and I certainly would forget these multiple reviews on the same ground. Habeas corpus is becoming the legal hobby in prisons. It is 20 percent of our docket. I do not mean to sound flippant. If I were in prison I would be attempting to get out, too, and prisoners deserve a hearing of their claim, but I do not think they deserve hearings and rehearings and rehearings.

Next, I think we ought to recognize that screening, although the lawyers, many members of the bar, do not like it, has a valid place. We get many, many frivolous appeals, more and more. A public defender in a prominent Eastern State, I am told, stated in a public meeting, not long ago, that many of the appeals his office filed have no arguable merit. As lawsuits against lawyers for malpractice proliferate, lawyers become much more ginger about abandoning a meritless cause. So they tend to appeal when there is no reasonable grounds for appeal.

The furnishing of a gratis attorney to persons who otherwise would not have been able to afford one, is a great, great fine step, but that has produced a lot of appeals and collateral attacks which otherwise would not have been made.

We do get a lot of cases that do not require oral argument, and I do not think screening should be abolished. It was adopted in order to try to deal with the burgeoning workload, but I think we ought to be given discretionary review in some types of cases, perhaps tax

court appeals, NLRB cases, the kind in which we are essentially reviewing experts, the determinations of experts, that would form at least one class where certiorari would serve.

Mr. WESTPHAL. At that point, Judge, what would the difference be, in your opinion, between discretionary review of certain agency matters and the manner in which the fifth circuit under its existing rules handles those matters, many of which are handled, under rule 21? It seems to me that whether you have discretionary review or whether you consider it under rule 21, the court and its staff and its clerks would have to give almost as much consideration under one procedure as it would under the other.

Judge GEE. I think they would have to give—certainly they would have to give consideration to it, Mr. Westphal, but our rule 21's are decisions in every sense of the word. We are deciding that case. We are looking at it fully and passing on the merits. This is a different procedure from looking at something and saying well, maybe they are right for the wrong reason or this matter is not of any sufficient significance to require—

Mr. WESTPHAL. My point is this—

Judge GEE. But I would agree with you, we have come a long way toward that.

Mr. WESTPHAL. If you get agency review matters now, the principal point is whether there is sufficient evidence to sustain the findings and order of the agency. Now, under what you propose, you would get a petition for a writ of certiorari to review that particular agency order and they would say, as the basis for it, that there was not sufficient evidence to support the Commission's findings and the order which they issued. In either instance, you are going to have to search enough of that record to see whether there is, or there is not, enough evidence to support the Commission's findings. At the present time, if you come to that conclusion, using rule 21, you enter an order which says enforced or affirmed. Under the procedure you suggest you would enter an order denying the petition for writ of certiorari.

It seems to me the work within your court for the judges considering that matter would have to be almost the same in quantity and quality.

Judge GEE. My response is that this type of review is the type in which legal assistants can be of most value. They can read the record. They can say judge, if you will look at pages so and so and so you will find such and such. They can direct your attention where you are looking for evidentiary support. That is why I picked these out.

Let me say this, also, Mr. Chairman and Mr. Westphal, I am offering these as illustrations of mine which I think should be considered. I am not saying that they are all panaceas or that they necessarily all should be enacted. I am trying to show there are things which could be done short of cutting the circuit up.

I have one last thing to say and then I am done. I say I think it would be preferable to go on up in the number of judges of our court and limit those who sit en banc. If we had to operate with nine panels going at once, 27 judges, we could operate in that manner. I have no doubt of it. We can muster out of our judges and senior

judges, probably with some district judges, we could probably have seven panels sitting at one time now, maybe even possibly more. We would have to control the en bancs in some manner. I understand there are proposals now for limiting the en bancs, the number of judges. I am not familiar with all of them and have not studied them, but I am confident that something could be worked out in that line.

We need the flexibility, the broad base and the diversity that we have in our present circuit. We could not have done the job that we have done, and I can say it without immodesty, because I am new on the court and I have had fairly little to do with it, that this circuit could not have done the job that has been done, split into mini circuits. I think this is the wrong way to lower the level of the water in the bathtub. I think you are throwing out the baby.

Thank you.

[Prepared statement of Judge Gee follows:]

PREPARED STATEMENT OF THOMAS GIBBS GEE, JUDGE, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mr. Chairman, Members of the Committee.

I am Thomas Gibbs Gee. I have been a Circuit Judge on the United States Court of Appeals for the Fifth Circuit a few months less than two years. Thus in a sense I feel I am still close enough to the practice to perceive as a lawyer, but far enough into judging to know a modest amount about it—though a great deal less than my colleagues who appear with me today.

1. *Our Present Situation in the Fifth Circuit.*—Statistics are not my forte, and you will have heard and considered enough already that any I might quote would add little. Further, he that lives by the sword dies by it; were I to attempt any statistical tour de force, you could rightly expect me to be an expert and source in the field—whereas a few leading questions in awkward areas would speedily demonstrate that I am neither. I shall therefore note only a few general figures:

(a) It is true that over the last ten years or so our filings have increased mightily, but it is also true that we have coped and have no significant backlog—less than 180 cases. Each of us sits on a circuit panel seven times a year. By sitting one additional week in our five panels of three judges each, each hearing the customary twenty cases, we could reduce that backlog by more than half. One additional week would wipe it out. To do so would be a serious effort, but not a convulsive one; and when a court is no further than this from absolute currency, so far as I am concerned, it is current. Anyhow, a small backlog is not undesirable; for one thing, it facilitates the calendaring and arguing of similar cases together.

(b) New filings this year have leveled off and Gilbert Ganucheau, our Chief Deputy Clerk and a highly competent statistician, projects no increase for this year. I do not know what this means, but it is a fact and a new one, for this is the first time in a long while that our filings have dropped.

These statistics show that if matters have, per chance, stabilized, we can make it as we are and without tinkering with a proven system.

2. *Our Current Personal Work Load.*—By my experience, it is heavy, but far from crushing. For one thing, we are fortunate in having good help and good facilities. The Congress has, for the present at least, authorized us sufficient help and a budget which permits us to attract and fairly compensate top quality people. I am grateful for this and I want to say so right out and loudly. If you work, nothing except your religion and your family (if you have either or both) exceeds the importance of the people you work with, and the quality of mine is one of the joys of my life. Further, compared to the life of a practicing lawyer, our schedules are as long, doubtless, but less emergency-ridden and far, far more within our own control. Court never starts without us.

In my judgment, there is room in our days for intermittent increases in work—emergency loads—and perhaps for a small increase in regular load, but for no more. It must be remembered, however, that my judgment here may not be entirely reliable because of two factors: as judges go, I am a relatively young man (49), and a very junior judge, serving on few committees, etc. If I were older and wiser, I would have more to do than hear cases and write opinions, and I would tire faster to boot. All the same, I think I'm probably not far off in my judgments here.

3. *Splitting the Circuit as a Solution of Our Consumer's Problems.*—Let us at the outset admit that destroying such a seasoned and tested outfit, which has borne the heat of the day and functioned in difficult times, is a thing to be avoided if it can be. At present, with filings leveled off, it is not immediately necessary. But if, as is likely, the increase has merely paused and will shortly resume at its former (or an increased) rate, the split will do no good beyond perhaps the year 1977 or so, as Judge Wisdom's remarks demonstrate. About that time, we will have as many judges in each new circuit as we have in the present Fifth and with as heavy a load per judge. Thus it seems obvious that the presently-proposed split is either too much or too little—why not wait a year or so and see? For surely it will not be wished to continue splitting until we arrive at circuit courts of such a size and manning as to be devoid of any Federalizing influence whatever, such as would one composed, say, of a piece of Texas, or of Alabama alone, staffed by native judges. The strength of the circuits has been entirely otherwise, drawn from the diversity of the laws administered, of the lawyers arguing, and of the judges deciding our cases. Once we put our faith in splitting to solve our problems, I see no logical stopping place short of continued division until we arrive at dinky little mini-circuits, degraded into local rather than regional courts and having no more (and perhaps less) harmonizing effect than the state appellate systems. Such an arrangement would have served the nation poorly in many matters of recent memory, and cannot serve well in others which will surely arise in days to come.

If you doubt my gloomy predictions, you have only to observe what has already happened. Already the pressure of events has forced a compromise of the two guiding principles with which you set out: no courts of more than nine judges (one new court has 11 and the other 12) and no circuits of less than three states (Texas and Louisiana are sent off alone together).¹

4. *What to do instead.*—The present bill represents one of those small reforms which are the enemy of large ones. While dismembering a time-tested, functioning and proud institution, it serves only to distract the attention from the real problem. This is that your Federal Courts are doing too many things they shouldn't be. I suggest the following steps as measures to cut down on our work load and increase our output:

(a) Eliminate diversity jurisdiction, an idea whose time has gone. Or at least deny it to resident defendants, in manufactured situations such as non-resident personal representatives, to corporations having local establishments in the state, etc.

(b) Abolish the three-judge court.

(c) Abolish rehearings and let the court initiate its own en bancs.

(d) Limit habeas (almost one-fifth of our case load and fast becoming a prison hobby) to persons asserting that they are not guilty and grounds directed to that end; forbid review of any ground (either on direct appeal or habeas) more than once.

(e) Recognize and support reasonable screening procedures, with adequate central staffs, etc. Screening has permanent value. Though it does more, riding us of the mushrooming numbers of frivolous appeals alone would justify it.

(f) Give us discretionary review in some kinds of cases, N.L.R.B. and Tax Court appeals, for example.

¹ On the erroneous suggestion, by the way, that both are civil-law backgrounded States. Texas is most emphatically not any such thing, having by statute adopted the common law as its rule of decision about as far back as the days of the Republic. Only our community property system comes from civil sources and these are Spanish, not French.

(g) Exercise restraint in the enactment of new programs. I realize this suggestion borders on the political and apologize for it, but truly it seems we hardly turn around anymore without stumbling over some vast new order, with appeal to us from the determinations of its administrators. I doubt many feel we are seriously undergoverned at present.

(h) Rather than cut up the Circuit, increase the number of judges further and limit those who vote on and sit en banc in some manner, requiring each sitting panel to contain at least one judge who sits en banc.

The above suggestions are offered mainly as concrete examples, to demonstrate that better measures than splitting the Fifth Circuit are available, measures which offer promise of permanent or at least long-term relief instead of lowering the water level in the bathtub by throwing out the baby.

Thank you.

The CHAIRMAN. The committee will be in recess for 5 minutes to give the reporter a little rest.

[Following a recess, the committee resumed.]

Senator BURDICK. I think I will take the witnesses in reverse order, taking the youngest first.

You gave a shopping list here of things that might be done——

Judge GEE. Yes, sir.

Senator BURDICK [continuing]. In lieu of making divisions in the circuit.

What State do you live in?

Judge GEE. I live in Austin, Tex.

Senator BURDICK. A practicing lawyer there?

Judge GEE. I was, yes sir.

Senator BURDICK. I wonder if you have known that for 3 years now, or maybe it is 4, that I have been the sponsor of provisions to do something about this diversity question.

Judge GEE. Yes, Mr. Chairman, I was speaking for posterity, and I know that you know.

Senator BURDICK. And do you know that as of this date that no bar association of a single State has endorsed the bill?

Judge GEE. They do not like our screening procedures either, Mr. Chairman.

Senator BURDICK. But I say you have to deal with the facts at hand. You cannot get this tool. Unless the bar association comes forward, because they have a strong influence on the gentlemen who vote with me, and so long as they take that adamant position I do not know what we will do about diversity. They will not move on it. They want the forum shopping provisions and so forth, so they will not come forward with approval. What do we do about that one?

Judge GEE. I will get to work on that as soon as I get home.

Senator BURDICK. I wish you had worked on it when you were a lawyer.

Judge GEE. That is a very good comment.

I can truthfully say that personally I have always been for it.

Senator BURDICK. What I am trying to point out to you, the tools you talk about are not within reach and yet you still have the problems, the backlog.

Let us take the three-judge court. As I know, you have been a strong supporter of that. We passed a bill for elimination of the

three-judge court in the Senate and sent it over to the House and there it lays. Again, these are the facts of life. It does not do any good unless it becomes the law of the land.

Judge GEE. I believe the bill that is now pending has been reintroduced again.

Senator BURDICK. Oh, yes, we will try it again, but I am saying these are the difficulties we are having. In the meantime the caseload builds. Nevertheless, if we have to wait for reduction of diversity jurisdiction, for example, we might get swamped.

Judge GEE. Let me say this, Mr. Chairman. We are not at the limit of our resources now, and our caseload, although it is increasing, we are coping with it. It is a fact. We are almost current. I do not mean to sound aggressive, but I am proud of our performance.

Senator BURDICK. Well, I have been in the forefront asking for greater efficiency, greater methods. I do not enjoy this idea of breaking up the circuits, either, but it comes to the point where you say you need more judges.

The testimony we have here to date indicates that you go past 9 or go past 12, or at least past 15 and your efficiency drops. That seems to be the general testimony.

Judge GEE. I wonder if anyone really knows, Mr. Chairman, because there is very little experience with larger courts.

Senator BURDICK. I do not have the record here before us, but as I recall it, that was almost the universal testimony, that when you get to a certain point you can operate efficiently and effectively, but beyond that it is like diminishing returns in the economic system.

Judge GEE. That may well be, sir. I cannot think of a court with more than 15 judges. Maybe there are some. If there are not any, then I do not know how anybody knows whether they can function or not.

Senator BURDICK. In your prepared statement you suggest that 15 judgeships in the present court could keep up with the work by sitting one additional week in the year. Of course, your statement presupposes that your existing procedures whereby oral argument is accorded to only about 36 percent of the cases would be the procedure you would have to follow in the future, is that true?

Judge GEE. That is true, yes sir.

Senator BURDICK. You could not increase the number of oral arguments under this theory?

Judge GEE. No, sir. I for one would not care to. We are set up now so that no cases are decided without oral argument unless three judges agree that oral argument would not help.

We have very diverse views of the law on our court. If you can get three of our judges to agree that oral argument would not help, and on one solution to a case, I do not think anyone is being prejudiced.

I do not like screening. I do not like the denial of oral argument, and when I was a lawyer I detested it, because I wanted to get up there and speak my piece. Maybe at an earlier time the Govern-

ment could afford to give me a forum to make a speech for a lost cause. But I do not think it can afford to do that any more.

Senator BURDICK. Do you think that is true of some cases?

Judge GEE. Yes sir.

Senator BURDICK. Judge Wisdom, I have a question or two for you.

Judge, in your prepared statement you expressed the fear that if S. 729 is passed it would trigger a proliferation of circuits. Certainly if we were to believe that nine is the magic number, our growing caseload would require more and more circuit splitting and pose the threat of having 20 or more circuits at the same time in the future. However, at this particular time we are dealing with the two circuits that have the largest land mass. The thrust of this bill is to reorganize the land masses into more manageable entities and at the same time it gives us the opportunity to employ more judges. On this basis, do you not see this division concept as an opportunity to work out a more flexible structure within the court of appeals?

Judge WISDOM. I see nothing flexible about it. It sets up a division that is autonomous, that each division has its own chief judge, its own council to make its rules to run the circuit, and I think each division is a circuit, separate circuit, except in name. There may be some virtue in keeping the name because at least it prevents dispute as to which division would be the fifth circuit.

But I do not see anything flexible about it. I would be curious to see that developed.

Senator BURDICK. You also referred to the federalizing role of the circuit courts. While it is true they play an important part in developing national law, is it not true that it is the Supreme Court through its power to decide conflicts between the courts which is the ultimate federalizing court?

Judge WISDOM. Of course, but a very small percentage of cases reach the Supreme Court. That court comes down with a broad mandate, such as desegregate with due speed. We have to make that broad mandate work. We do not get the specified guidelines from the Supreme Court in many, many cases. We have now questions involving border searches, for example. We have to work our way through to a proper solution, case by case, until the Supreme Court gives us additional good answers. But we are the court of last resort in many cases.

Senator BURDICK. Do you feel that we have reached or will reach soon the point where the Supreme Court is going to have to have some help in performing this function?

Judge WISDOM. Yes, I do. I think that—I mention this in some of my other statements, but I think we may have to give thought to a court of national review, not the Freund court. I think its recommendation has it backwards. I think that the Supreme Court should be able to refer to a national court case which may be not quite Supreme-Court-worthy, but should be settled by a national court. This would be particularly true in the tax field where it might be desirable to have a reasonably prompt construction of the tax law without waiting for intercircuit conflicts to develop.

I think it would be true in other fields.

I think somehow a national court of review might have a discretionary power to review habeas cases, prisoner cases, and 2255's that would bypass our courts which would help us, too.

I think there are many, many things that can be done and should be done. My own feeling is that, if this great body comes out in favor of S. 729, the general public will think that this is a solution, but I know and you know, as from your own statements on the floor of the Senate, that increasing judge power is not a solution.

Senator BURDICK. I agree with you.

Judge WISDOM. Now, you tell me that the tools—you do not have the tools. That is in effect saying that you may have something good to offer the Congress, but we do not think it can get by politically. I think that may well be, and this is no criticism of you or of the committee. Perhaps, however, you underestimate the weight of this committee with the American public.

I think that the committee, the Commission and the committee should come out strongly in favor of what is right, and if it does I think that is not politically unrealistic.

Senator BURDICK. I agree with you, but we still have to count votes.

No, I do not think judges alone are the solution. I have said that many, many times. I think there are many reforms and many things we can do here. I just heard this morning that the staff attorneys have helped a great deal.

Judge WISDOM. Yes, they have. We have 200 or more dispositions this year than last year, although we have lost two of our four central staff attorneys. We had some budget problems.

Senator BURDICK. But that may not be the total answer to the problem.

Judge WISDOM. No, I think there is no total answer. I think there has to be an attack on the broad front, but certainly the input has got to be reduced.

Now, the Commission's hands are tied to some extent, because it's enabling legislation does not allow it to explore how jurisdictions may be reduced. But certainly—you have given a lot of thought to this, and I am sure you have considered, too, that the major way of reducing the flow, the burden is by reducing the input at both levels, both the district court level and the appellate court level.

When one talks about 10 percent diversity cases at the present time you are talking about 330 cases in the fifth circuit, just diversity alone. I should think that that would have a political appeal on the ground that it is being in the interest of the States to have State judges interpret their own law, and the opposition. I believe, comes mostly from claims attorneys.

Senator BURDICK. Judge, the operation of the law has been a mystery to many of our average citizens. They do not follow this like lawyers do. They take the lawyer's word for positions. They do not have the insight that you and I might have.

Judge WISDOM. Would you not be disappointed, though, if you thought the public construed this bill as a solution?

Senator BURDICK. Certainly. I am not going to present it as a total solution. It is going to be a partial solution.

Judge WISDOM. Well, I feel strongly, however, on the other hand that a partial solution of this nature does more damage than good by diluting our Federal function.

Senator BURDICK. Judge, given the caseload in the fifth circuit, there seems to be no question but that the court has to have a minimum of 23 judges to do the work.

Judge WISDOM. Yes.

Senator BURDICK. Moreover, you predict that if the caseload expands rapidly that a total of 30 judges may be needed in the near future. Is there not the question of whether a court of 23 judges would be more or less efficient than two divisions of 11 and 12?

Judge WISDOM. I think the ninth circuit is a court now of about 79 judges. We do not have quite that many.

Now, the English Court of Criminal Appeals handles 10,000 filings. They have worked out a solution.

Senator BURDICK. You know, I heard that testimony given previously here.

Judge WISDOM. Yes sir.

Senator BURLICK. And if I can get the time, I am going to England to see how they do that. I am serious about it.

Judge WISDOM. I am serious about it, too. One thing, they make it difficult to appeal. The lawyers discuss the appeals with a judge or master. The sentence may be increased. I am not suggesting that we should do all of these things, but there are many things than we can do. They use a large central staff.

Senator BURDICK. Well, I do not know whether they go as far as we do in protecting constitutional rights and all those things.

Judge WISDOM. I do not think they do, and I would certainly feel that we would have to step very warily in any area affecting constitutional rights.

Senator BURDICK. I believe I am going to turn you, and Judge Brown, over to the staff. You have touched upon some technical things.

Mr. WESTPHAL. I think before I get to Judge Brown, if I could continue on with Judge Wisdom, Mr. Chairman.

On this last point that you and the chairman were talking about, it appears to me that we have spent 200 years in this country developing a judicial system in which we take pride in the fact that every man is entitled to relatively free access to our courts, he is entitled to his day in court, and like it or not, we have built up as part of that theory that each case is entitled to one review. Now, unless we scrap that theory, it seems to me it is difficult, extremely difficult to come up with a substitute system which would say that after the man has had one trial that then he is not entitled to have someone else make a judgment as to whether the result was or was

not right. If that is all he is entitled to, we can structure a completely different system whereby that result can be reached without briefs, it can be decided without briefs, it can be decided without oral argument. Maybe you can computerize whether the traffic light was green or red, and what the speed was, and maybe we can program out a means of passing onto that litigant a judgment of our system that the original result was right.

But after 200 years of the other system, it seems to me that our problem is one of structuring our system so that that individual litigant, whether he wins or loses, walks away from that experience with the feeling that he has received due process; that justice apart from the result has been brought about by the procedure and the attention that his case has been given. This is one of the fundamental factors that enters into our consideration of what is the best solution for a very difficult problem. Do you agree with that?

Judge WISDOM. I agree in part. First, I would distinguish between civil cases and criminal cases. I point out to you that for a long time, even in criminal cases there was no appeal except from capital cases.

Now, in civil cases I think that there are certain areas where one trial is enough. I see no reason, for example, why a personal injury suit, which is tried by the jury or tried by the court without a jury where the evidence is unquestioned and the case really turns on substantial evidence, why that is not enough.

Take social security cases, which do not constitute a great number, but still take time and every little bit adds up. In social security cases, why not appeal the hearing in the district court? The same thing might be true in longshoremen and harbor worker cases.

I think there would be very few instances in which there would not be one review. But I think we could require a certificate of probable cause, for example. The trial judge would have to sign that as in certain cases now, a certificate of probable cause.

I think the shopping list that you have heard from Judge Gee and perhaps from others, I among them, the shopping list is one that is very long, indeed, and if it were presented as a full package with the weight of this committee behind it, I am not so sure that Congress would not say well, we have got to do something.

Mr. WESTPHAL. Judge, as the chairman of this subcommittee has pointed out, during the period of time that this subcommittee has taken the lead in looking at this shopping list of methods to reduce the input, that during that period of time in just some 3 or 4 years the caseload in the fifth circuit has grown from 2,300 cases to almost 3,300 cases. Now, if we cannot get more action on the shopping list than we have been able to get in the last 3 or 4 years, and in the face of a caseload which has increased almost 1,000 cases in that short interval, it seems to me that if we do not do something now to alleviate the problem that the fifth circuit and the ninth circuit will truly be swamped.

There are requests for creating a 10th judge in several of the other circuits, so that the rule of 9 is being breeched, but the ulti-

mate problem is that the appellate process has been so beset with congestion and delay, more so in the ninth circuit than in the fifth circuit, but that something has to be done now in order to give the Congress time to come to an ultimate solution on a whole list of items on the so-called shopping list.

Judge WISDOM. Well, I would agree with you if I thought that this bill would alleviate the situation, and I think you have already demonstrated that it is not going to alleviate the situation to the extent that the Hruska commission thought, because you have upped the number of judges from 18 to 23 in a year.

Mr. WESTPHAL. Well, the reason for that Judge, is this. I layed on the white table there, a copy of an updated version of committee exhibit E-5 that was used in our prior hearings last fall, and if you will look at exhibit E-5 you will see that for fiscal year 1974, the average length of time for U.S. civil cases in your circuit involving a case decided by a full-blown signed opinion, that the average time was 378 days. This is just about the same, although slightly larger, than it was in the preceding fiscal year, 1973, when the figure was 371. For all signed opinions in your circuit the average time is now 369 days, whereas a year previously it was 349 days.

In the comparable exhibit for the ninth circuit, you will find that in the ninth circuit their time factors are almost double yours. They have up to 749 days, where you are running 378 days, and in the ninth circuit this is a drastic increase above the prior year's figures.

[Compare Exhibit E-9 at page 61 with Exhibit E-5 at page 78.]

So the thrust of this bill is to try to respond to some of the testimony that we received from lawyers in these two circuits to the effect that when it takes that period of time in order to get a final resolution on appeal, when it takes, as it does in the ninth circuit some 22 months from the time you file your brief until you even get notice of argument, and when it gets to the point where you have to file supplemental briefs in order to get caught up with the intervening case law, that is a type of appellate process which lawyers do not like, and I am sure the judges do not like that type of delay.

Judge WISDOM. You will find that our median time is probably lower than almost any other circuit.

Mr. WESTPHAL. Considering the caseload you have, you have a much better record than the District of Columbia has, there is no doubt about it. But this is, I think, the real thrust of what the committee is trying to think of here in this legislation.

Judge WISDOM. Let me ask you a question, if a witness may ask you a question.

Do your projections take into consideration the appointment of new district judges?

Mr. WESTPHAL. This legislation is not based on projections.

Judge WISDOM. Well, I realize that, but unless you consider the projections which one should do because of the additional district judges, this will not give any relief.

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case - F.Y. 1974

Circuit: Ninth

Circuit: Ninth

Type of Case and Opinion	Number of Cases	Avg. Time Appeal-Period (days)	Avg. Time Record-Last Brief (days)	Avg. Time Brief-First Appeal (days)	Avg. Time Appeal (days)	Total Average Time Appeal-Opinion (days)	Remarks
U.S. Civil - Signed Opinion	90	109	174	42	17	717	
Per Curiam	10	81	142	34	1	380	
Memorandum	26	85	142	34	6	592	
No Opinion	42	70	170	1	1	1	
Private Civil - Signed Opinion	119	10	174	37	17	759	
Per Curiam	119	96	142	34	7	600	
Memorandum	85	80	142	34	2	592	
No Opinion	43	67	142	37	30	577	
Prisoner Pet. - Signed Opinion	37	87	174	18	10	541	
Per Curiam	87	90	78	17	4	62	
Memorandum	21	78	57	204	24	402	
No Opinion	49	71	46	19	37	464	
Criminal - Signed Opinion	159	92	54	4	12	11	
Per Curiam	302	89	57	30	2	32	
Memorandum	92	72	51	37	5	26	
No Opinion	121	72	5	37	2	32	
Admin. Agency - Signed Opinion	25	1	174	220	17	346	
Per Curiam	59	14	141	30	3	11	
Memorandum	14	31	87	233	3	412	
No Opinion	21	4	13	22	3	33	
Recapitulation							
All Signed Opinions	444	64	125	213	174	575	
All Per Curiam	275	75	46	174	28	413	
All Memorandum	141	75	75	184	7	47	
All No Opinion	213	7	95	13	3	32	
Circuit Average	145	81	10	110	25	414	

Mr. WESTPHAL. All right, Judge, let us consider that projection, then.

You have suggested in your testimony that by virtue of the Speedy Trial Act that there will be a need by 1979 for an additional 40 district judges within the 6 States that comprise the present fifth circuit.

Judge WISDOM. Right.

Mr. WESTPHAL. And you also suggested that from a statistical basis that each district judge seems to generate 40 appeals per year.

Judge WISDOM. This has been our experience, 38 to 41.

Mr. WESTPHAL. So that on that basis we can project an additional 1,600 appeals by 1979, added on to the 3,300 appeals that were filed in the fifth circuit in fiscal year 1974, so we would have——

Judge WISDOM. Plus normal growth.

Mr. WESTPHAL. So we would have a caseload of at least 4,900 or 5,000 cases in the existing fifth circuit. Now, you do not seriously contend that a court of 15 judges could handle that caseload, do you?

Judge WISDOM. No, I am not at all. I am saying, though, that dividing it into two will not handle it, either.

Mr. WESTPHAL. All right. So that we must necessarily find some means of employing more judicial manpower aided by a competent staff, whether individual law clerks or staff attorneys, performing a proper function so that that type of a caseload can be handled.

Now, one could project either the minimum of 23 judges, or perhaps 30 judges would be necessary to handle a caseload of 5,000 cases. Now, I think what it boils down to is this, Judge: Do you really believe that a single court, consisting of 30 judges where only 9 out of the 30 would constitute the en banc panel, do you feel that is more acceptable than this so-called division concept?

Judge WISDOM. It certainly is to me, because that would still be a court of judges selected from a broad base.

Mr. WESTPHAL. All right. Now then, what type of reaction do you think we will get if we select those nine judges for the en banc panel from the nine most senior judges? What kind of reaction do you think we will get from the other 21 judges on that court who will be bound by the law of the circuit as determined by those 9 men, and yet they will have had no input into what that law of the circuit should be?

Judge WISDOM. I think that it is possible that some of them will take it just as an attribute of seniority, inherent in the seniority that attaches to long tenure on the court, and I think others will resent it, but I think that resentment is minor, and not worthy of consideration compared with advantages of having a small en banc court instead of a full en banc court.

Mr. WESTPHAL. I would grant you that if what we are dealing with is just numbers, it is easier to work with 9 rather than 15 or 20 or with 25, but when you stop and think about that, would you not think that there would be more problems if you would suppose that the 21 judges who had no voice in the en banc decision were of the completely opposite view on that issue and yet here they were, they would be bound by the decision of the 9?

Judge WISDOM. Well, I have been on en banc courts where we divided 8 to 7. I was one of the seven. My point is, you do not mind so much being on the losing side if you are one of the seven——

Mr. WESTPHAL. You played the game, however?

Judge WISDOM. I understand, I understand. But my point is that what we want is certainty, uniformity, and that is important. I think every judge, whether he is in the 21 or whether he is in the 9, will feel that certainty is more important than his personal feelings.

Mr. WESTPHAL. Well, we want certainty and uniformity. People have suggested if we are going to have the en banc function performed by only nine out of a given larger number of judges, that rather than go by seniority there should be a system devised for rotating those nine judges.

Judge WISDOM. I have suggested this myself.

Mr. WESTPHAL. Now, if you do that then you run afoul of what Dean Griswold has always referred to as his principle of predictability. I think that we must necessarily give some consideration to Dean Griswold's point on predictability, because if I am practicing law in a circuit which has 30 judges and then at various times nine of them will be rotated to sit in an en banc function, I may well decide that, notwithstanding a prior precedent in that circuit, I will pursue an appeal in this case just in the hopes that on the luck of the draw I can get the nine that have to sit on my case to disagree with the prior nine.

Judge WISDOM. Well, let me answer it this way: I think from my experience that there are many cases which are put en banc because of their importance, and they should not be. That should not be one of the criteria. My experience suggests that putting the case en banc simply delays it reaching the Supreme Court, if the case really is important. So I think we must discipline ourselves and remove from the criteria for putting a case en banc the criteria of its importance. A case should go en banc only when there is a possibility of, or actual conflict within the circuit.

Second, I think that we are allowing a small point, the tail to wag the dog here. This is a small technical problem. Why should we not try out a court of 23 and have an en banc of nine and see if that works, and is it not better than dividing the fifth circuit? How do you know it will not work?

Judge GEE. If I might say so, Mr. Westphal, you could do that and then if it did not work you could split it and you would have all your judges ready to divide.

Mr. WESTPHAL. As I recall prior testimony which this subcommittee received in connection with S. J. Res. 122, the chief judge of the Fifth Circuit testified that back some years after the fifth circuit had reached 15 active judges that through the help of senior judges from the fifth circuit, from visiting judges from other circuits, and some district judges from within your own circuit, that the fifth circuit at times operated with an equivalent judgeship of 19, 20, and 21 for several terms, and that that had certain drawbacks. So that, as I understand that testimony, it was to the effect that a court of 19, 20, or 21 equivalent judges was not an effectively functioning court, and that that experience was one of the factors which led the fifth circuit as a body, meeting in judicial council, to advise the Judicial Conference of the United States that they did not want more than 15 judgeships created in the fifth circuit. So that is the basis upon which there has to be some discussion in the subcommit-

tee to the effect that we have tried a court of 20 or 21 judges and from experience it does not appear to work and therefore something else should be tried.

Judge WISDOM. There is a simple answer to that. Some of those judges came from other circuits, and lawyers generally do not like judges from another circuit serving in their circuit. Nor do they like district judges sitting on the panel.

But if you have a court of 23 judges all from the fifth circuit, you would have an entirely different kind of a court from the kind we have now, or from the ninth circuit where they, in effect, can draw on 79 judges.

Mr. WESTPHAL. Turning to what you say is your main point, Judge Wisdom, in your opposition to S. 792, and that is you suggest the passage of S. 792 would dilute the federalizing role of the circuit court, at least the circuit court of the fifth circuit, because under the proposal the 11 judges in the one division and the 12 in the other would be drawn from too small a base so that you would not have a proper cross section to exert this federalizing influence and to overcome local pressures in sensitive cases.

Judge WISDOM. Right.

Mr. WESTPHAL. All right. Now, then, of course we started out in our Federal system with probably the best cross section court you could ask for, and that is up until 1891, we had a Supreme Court of nine justices drawn from some 45 or 46 states. They represented the nation as a whole. That was the best cross section we could possibly have in order to exert a federalizing influence for uniformity in interpretation of Federal law, is that not true?

Judge WISDOM. Yes, that is true, but there is a big but there. Let me answer that question.

The reason that system was done away with was because the Supreme Court justices were put to such an onerous task in riding the circuits.

Mr. WESTPHAL. All right, and then——

Judge WISDOM. And it really caused more disruption in their other business and put a great deal of hardship——

Mr. WESTPHAL. So then in 1891, the Circuit Court of Appeals System was fashioned in order to relieve the pressure upon the Supreme Court, and indeed, those courts were deemed to be national courts, although sitting and organized on a regional basis. In 1927 or 1928, we had to do something about the problems in the old eighth circuit and the tenth circuit was spun off. And now for 20 years or more, there has been talk about what to do with both the fifth and ninth circuit.

Once again, it is a problem of trying to get sufficient manpower into the Federal Court system in order to perform both its appellate function and its federalizing function of applying uniform Federal law throughout the country. We have reached the point in two respects where something has to be done. We have these problems in the fifth and ninth circuits. We have the problem which leads to consideration of some sort of a national court of appeals. So these problems are there and decisions have to be made, and it may be necessary to break up these large land masses and narrow somewhat

the cross section from which you draw judges. That criticism could be made in 1928, when the tenth circuit was spun off from the eighth circuit, that we were reducing the land mass and the cross section from which circuit court judges were to be drawn to handle that business in that large area.

Judge WISDOM. You refer to a large land mass, but they were broken up not because the circuit was too large a land mass, but because it was hoped that division of the circuit would provide the judicial manpower to handle it, and it did in that case. But it is not going to do it in the case of the fifth circuit, and therefore, I say to you let us try a lesser alternative before we take the irreversible step of dividing the fifth circuit.

Mr. WESTPHAL. And that lesser alternative would be to operate with the court of 23 to 30 judges as the caseload requires?

Judge WISDOM. That would be my feeling.

Mr. WESTPHAL. Judge, also in your testimony you suggested that rather than just concentrate on the fifth circuit and ninth circuit that the Commission, and in turn this subcommittee should have considered a real realignment by increasing the work load of the first circuit, which is a small three-judge court, and finding some additional work for the District of Columbia Court of Appeals, which, since the reorganization of the local courts here, has had decreasing caseload.

But I take it you are familiar with the fact that the Revision Commission in the very early stages of its studies gave great consideration—

Judge WISDOM. I know, computerized it.

Mr. WESTPHAL. Well, they did it on more than a computerized basis. The thought was, for example, that states could be attached from the fourth circuit and realigned with some of the Eastern states from the fifth circuit and we could have sort of a ripple effect. We could start out with the first circuit and work our way through the Federal system and wind up with maybe 15 circuits, which again would be a proliferation in your sense of the term, but also it would have the added disadvantage of dislocating a number of States from the circuit law that they had grown up with and had been accustomed to. So there seemed to the Commission, and to the subcommittee, to be certain drawbacks to a ripple effect realignment of every one of the circuits in the country.

Do you have any thoughts on that?

Judge WISDOM. Well, to some extent you have done that. You will have disrupted, if this bill passes, you will have disrupted the law in six states, the Federal law in six States of the fifth circuit and certainly disrupted the ninth circuit. It is not my duty to talk about the ninth circuit, but your proposal is especially disruptive because of the division of the State of California.

So the bill is going to have a disruptive effect in any way, and that is another reason why we ought to have something else.

Mr. WESTPHAL. Well, the western division of the fifth circuit will carry with it, on the day it starts, its prior precedents from the former undivided fifth circuit, will it not?

Judge WISDOM. It will, but it will be a question of applying those prior decisions, and that is where conflicts will arise.

Mr. WESTPHAL. They will be applied according to the law and facts found by both the trial court and the appellate court, and standing astride of either division will be the Supreme Court of the United States, to again enforce the rule of law. Is that not true?

Judge WISDOM. That is true, with some possibility of twice as many conflicts.

Judge BROWN. Let me raise a question, if I could, because in New Orleans, some of us suggested maybe the law ought to express what the rules should be, and we kind of backed away from it thinking that it was a judicial matter that Congress could not legislate on.

But suppose on the day when this act goes into effect a case comes up in the eastern division which is clearly controlled by a panel decision of the fifth circuit that happened to be made up of judges who came from the western division. Now, will it take an en banc decision of the eastern division to get rid of that prior precedent? That is another thing that is let loose.

Mr. WESTPHAL. To answer your question, if I could, Mr. Chairman, the answer would be yes, and that is simply because any court possesses the power to overrule its own prior precedent.

Judge WISDOM. Do you think there will be more prior precedents overruled when we have two new circuits?

Mr. WESTPHAL. I do not know. That would depend upon the perception of the judges before whom such questions are raised.

Judge GEE. Mr. Westphal, may I make a final observation, and I will not interrupt again.

I think what Judge Wisdom and I are both saying is essentially something very simple. These are momentous matters. You know this as well as we, better. In momentous matters we are breaking new ground, and it seems to me it is always best to move as carefully as you can.

We do not have the problem in the fifth circuit that the ninth circuit has. The lawyers are not having to file supplemental briefs in cases that are 2 years old. We do not have any emergency. We are coping with our problem.

Mr. WESTPHAL. But we hear lawyers who object to the procedures you have used in order to cope with your problem. They object to being accorded the right of oral argument in only some 36 percent of the cases. They object to the fact that even when oral argument is granted, some of them get as little as 10 or 15 minutes of oral argument, having traveled some 700 or 800 miles to where the court is sitting. They object to some of the rule 21's in which they are told only "enforced" or "affirmed" and given no explanation at all. There are lawyers who will raise questions, and did before this committee, about the excessive use of or reliance upon staff attorneys in the preparation of proposed opinions which are then reviewed by the court to see whether the court wants to issue the work product of the staff attorney as the opinion of the court.

So that all I am suggesting is that the subcommittee has, along with the Commission on Revision in the Appellate System, the so-called Hruska Commission, has spent a long time wrestling with

these same problems we have discussed here this morning, and I am sure all of us think this is like playing back another record we have heard before. It is like reruns on television.

But when you get down to the final analysis, there is a proposal which has received the support of five of the six Bar Associations in the six States in the fifth circuit, which has received the support of a majority of the 15 judges, which has received support from quite a broad spectrum of the country.

It is true that the Louisiana Bar Association objects to it, but as an alternative, I might point out, they suggest that if the fifth circuit has to be split, that the four States of Texas, Louisiana, Mississippi, and Alabama, be aligned into a four-State-circuit which would have, according to the 1974 statistics, a total caseload of 2,013 cases, which would require 14 judges to handle. Then they suggest a two-state, not a three-state, but a two-State circuit of Georgia and Florida, which would have, along with the Canal Zone, total filings of 1,276 cases, which again——

Judge WISDOM. Which State is that?

Mr. WESTPHAL. Georgia and Florida.

Judge WISDOM. What State recommended that?

Mr. WESTPHAL. The Louisiana Bar Association.

Judge WISDOM. The Louisiana Bar Association resolution which I submitted to you this morning opposes the division of the circuit and suggests in the alternative that Mississippi be assigned to the circuit with Louisiana and Texas.

Mr. WESTPHAL. Well, I will read to you, judge, from the resolution that you handed to me.

Be it further resolved that in the event the Commission does not adopt the view of this board above expressed, its proposed revision be altered to include the states of Texas, Louisiana, Mississippi, and Alabama in one circuit and the states of Georgia and Florida and the Canal Zone in another.

That is the alignment I was just suggesting, in which I indicated that if the subcommittee were to adopt the recommendation of the Louisiana Bar Association we would then have a four-State-circuit, one would require 14 judges, the other would require 9, again a total of 23, and it seems to me that one could draw a judgment there as to whether it is better to start out with circuits of 11 and 12 judges rather than judges of 9 and 14, because once you start with 14 there is little or no leeway in case you need an additional judge or two to meet an increasing caseload.

Judge WISDOM. I would like to make a comment on that.

The first resolution is an opposition to division of the circuit, and I think that probably Alabama was thrown in there for bargaining purposes in the hopes that perhaps Mississippi would be assigned.

Judge GEE. Mr. Westphal, if I could finish my little statement.

It was going to be that either way we are going to be doing something drastic. The fifth circuit is not in the situation in which the ninth is at present, and I know as well as you that if we stick on 15 judges and the filings go up, as they will, we lose. I am not advocating that. I would say go up on the judges and see if the court can function, and if it cannot, then divide it.

I have nothing to say about the ninth. It is in a much more serious situation than we—well, it is in a serious situation. We are not.

I recognize that the lawyers are not pleased with all of our procedures. When I was a lawyer I was not pleased with all of them, either. But they are necessary and there is no perfect way to handle this situation until jurisdiction is——

Mr. WESTPHAL. I would now like to address a few questions to Judge Brown.

Judge. you have suggested there may be some perfecting amendments left to be accomplished in this bill, one with reference to the power within the fifth circuit with two divisions to assign senior judges to serve in another division of that circuit, and another with respect to the problem of whether a senior judge who sits on the three-judge-panel should be a member of the en banc panel which might thereafter consider that case. I thought these problems would be taken care of by our prior perfecting amendments, and I will be glad to discuss those with you at the conclusion of the hearing. I do not think we need to take the time right now.

Judge BROWN. I have something scribbled out here, and I will read it to you when we have adjourned, that takes care of this.

Mr. WESTPHAL. You made a suggestion to the effect that the effective date of the legislation passed should be the date on which the new judges take their seats. It seems to me, that it would be pretty hard to make something of that kind a triggering event for the effective date, because if there are any uncertainties about the nomination, confirmation, or appointment process that should not be the triggering date, because then a litigant would really not know when the division took effect. There would have to be some additional promulgation of the fact that we now have seated the 23d member of the court, or the 11th member or the 12th member in either case.

Judge BROWN. What I envisage would be a sort of combination of your section 5 and then appropriate wording on the effective date so the President would have the power to go ahead and make the appointments.

Mr. WESTPHAL. I think about all the Congress can do, in any event, is to give the President the power to nominate, to urge that the Senate proceed with the confirmation process as rapidly as possible. There was legislation, for example, that required the President to appoint the members of a Presidential pay commission at a certain time, and I think that was fairly definite. Yet, the President did not appoint the members of a pay commission. It just seems to me we cannot start out legislating on the assumption that constitutional officers will not perform the duties that we place upon them by legislation.

Judge BROWN. Well, technically you are correct. There would be uncertainty, perhaps, as to when a particular new appeal becomes that of the western division or the eastern division. For all practical purposes, until these judges are nominated and seated the operation from the standpoint of the bar will be exactly as it is today. The eastern division has pledged they will help us bear the load. We have no doubt they will live up to that commitment, which means we will have the panels looking just like they have been looking. They will

sit in New Orleans most of the time, and the bar—except that I do not know where we stand on who is going to be on the en banc court.

Mr. WESTPHAL. Well, there will undoubtedly have to be a transition period here in which some of these problems are worked out. I really do not see how this legislation can do more than provide for the appointment of the new judges prior to the effective date of the division.

Judge BROWN. Well, I remind you that when the Circuit Revision Commission was established the timetable on parts A and B were geared to the date on which the ninth members of a 16-man commission qualified. I was suggesting some sort of approach like that plus your language that would give the President the power to make the appointments, contemplating they would be effective when the last one of them is confirmed.

Mr. WESTPHAL. We found that even the method we used in creating the commission was not as definite as we would have liked, because there were some occasions to either hasten or delay the appointment of that ninth member.

But in any event, your suggestion will be given further consideration.

One last point, if I could. You made some reference to the provision about what triggers the convening of the joint en banc panel in the ninth circuit. While you concede that procedure is not applicable with the fifth circuit, you do raise some question about it. Of course, the language of the bill is that either the petition of a party or the certification by one of the divisions in effect triggers the joint en banc panel, but that is not to say that the joint en banc panel must sit and must grant a full blown rehearing with oral argument and additional briefs to everybody who petitions or in every case where there is a certification. It seems to me that that joint en banc under this statutory language will still have the discretion which any court sitting en banc has, and that is to decide whether they are going to grant or deny the petition for a rehearing en banc.

Judge BROWN. What concerns me is not the part that allows a division to certify it, but the language as I recall it in your revised bill says such a court will be convened on the filing of a certificate or the petition of a party.

The thing that bothers me is that you allow a petition by a party to set the en banc machinery in motion, which goes way beyond the present F.R.A.P. Rule 35, because there the parties merely suggest it and we have a duty to look at it and that is all. They cannot compel us to take a vote. En banc petitions are a real burdensome thing in the fifth circuit.

Mr. WESTPHAL. I think we will explore the point you raised more fully with the ninth circuit judges.

Judge BROWN. They will probably tell me to stay in Texas.

Now, can I say one thing? Do you have any further questions?

Mr. WESTPHAL. No.

Senator BURDICK. I have one.

On the assumption we have a 30-judge circuit, how many en banc judges would you recommend?

Judge BROWN. Well, it will be double tiered. I have just about changed my mind. I just about thought before that you had to have a whole group in there, but that will not work. You cannot have an en banc court that is meaningful with 30 judges. Our experience today is not at all satisfactory. We have six- or seven-to-eight decisions and in the last couple of experiences we were eight-to-eight where we have a senior judge, and when we come out, we cannot even generate any kind of a judgment on very troublesome, statutory or constitutional questions.

Senator BURDICK. Let us stop short of using computers.

Judge BROWN. If you have not seen lexis work you ought to, because it is amazing.

Senator BURDICK. Are you saying the larger the number of judges on a circuit, the more difficulty we are going to have with en bancs?

Judge BROWN. The en banc hearings will be much more difficult and I think it will probably pose some additional problems. Judge Wisdom is correct, we learn each day, but slowly. We need to discipline ourselves better. We realize some cases should never have been put en banc.

Now, I did want to say this. The suggestion is made we might sit another week. Well, I have been a man with a strong whip in his hand and the power of statistics to goad judges into working harder and harder. Each year we have done more, each year we turn out more cases than the year before. But the judges, I think, a majority of them have pretty well reached the conclusion that no matter how you do it, with 55 percent summary II's without oral argument, that they are just doing as much as they can. I was directed to appoint a committee to study some kind of a system by which we could put some kind of a ceiling on our output, recognizing we can only go just so far. I want you to look at that exhibit on backlogs closely, because the nonpreference cases are not frivolous. They include civil rights, tax, admiralty, all those things.

Then I think we have to bear in mind always that we not only have 7 weeks of regular calendar, but 7 days of en banc so far, and we will have 2 to 3 days more in June. In addition to these cases, there are school cases which we have handled in a somewhat difficult way. Administrative orders are getting more and more complicated.

I am sure John Wisdom remembers what I call the tranquil days. I wrote 78 opinions in my first year. But I did not have to struggle. Then the ceiling started falling in and we have so many real difficult cases now. So I do think that while we can do more, there is not too much more, and I really do think there is a solid basis for seeing the growth of a backlog that in not too long a time is going to either keep many litigants from having their cases heard at all or heard on a stale brief.

That is it. Thank you again.

Senator BURDICK. If that is it, thank you.

At this time, without objection, there will be included in the hearing record copies of the following resolutions and letters received from various bar associations in the fifth circuit States:

One: Letter dated February 18, 1975, from Marshall R. Cassedy, executive director of the Florida Bar Association, together with a telegram dated March 17, 1975, from Mr. Cassidy.

Two: Letter dated January 20, 1975, from Cubbedge Snow, Jr., president of the State Bar of Georgia, together with the formal statement referred to in the letter. The Georgia Bar position is also reflected in the excerpt from the minutes of January 10, 1975, as certified by Mr. Omer W. Franklin, Jr., a copy of which is also included.

Three: Letter dated February 17, 1975, from Alto V. Lee III, president of the Alabama State Bar enclosing an official statement of that organization.

Four: Letter dated March 4, 1975, from James Hugh Ray, president of the Mississippi State Bar.

Five: Letter dated March 10, 1975, from Kent Breard, president of the Louisiana State Bar Association, to Judge Wisdom enclosing a resolution of that association.

Six: Letter dated March 14, 1975, from Lloyd Lochridge, president of the State Bar of Texas.

Seven: Letter dated December 9, 1974, from John H. Hall of Dallas, Texas, a witness at our prior hearings.

Also exhibit E-5 showing the 1974 statistics will be received.

[The materials listed above follow:]

THE FLORIDA BAR.

Tallahassee, Fla., February 18, 1975.

Re S. 2990.

HON. QUENTIN N. BURDICK,

Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR SENATOR BURDICK: In behalf of President Jim Urban, I am pleased to respond to your recent letters concerning the captioned legislation now pending before your subcommittee on Improvements in Judicial Machinery. We appreciate your courtesies in requesting the views of The Florida Bar on this most important legislation.

For more than two years the Board of Governors of The Florida Bar has given this subject careful study. A special committee of The Florida Bar was appointed and a representative of this committee appeared before your subcommittee last fall to offer testimony in behalf of The Florida Bar. Since that time, the committee has been contacted, and it is our recommendation that this legislation in its present form be given favorable consideration by the U.S. Congress.

It is our further belief that by establishing separate divisions of the 5th Judicial Circuit, adding several additional appellate judges, and affording the court an opportunity to sit in several additional locations within the division, the people of our four states will be better served and the administration of justice substantially enhanced.

In behalf of the 17,320 lawyers and judges of Florida, we wish to express to you and the members of the subcommittee our appreciation for a job well done.

Sincerely yours,

MARSHALL R. CASSEDY.

[Telegram]

THE FLORIDA BAR.

Tallahassee Fla., March 17, 1975.

HON. QUENTIN N. BURDICK,

Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

Whereas the Florida Bar recognizes that action to relieve the appellate case-load in the Court of Appeals for the Fifth Circuit is urgently required and should be accomplished without further delay.

Be it resolved by the board of governors in regular meeting at Sarasota, on this the 14th day of March 1975, endorses and approves S. 729 as a practical and reasonable way to accomplish the necessary relief desired and is in the best interests of the bench, bar, and citizens of the States affected by the proposed division of the Fifth Judicial Circuit and the board of governors of the Florida Bar does hereby recommend favorable action on this legislation by the Congress of the United States.

MARSHALL R. CASSEDY,
Executive Director.

STATE BAR OF GEORGIA,
Macon, Ga., January 20, 1975.

HON. QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: Following up my letter of December 18, 1974, in which I expressed appreciation for forwarding me the copy of S. 2990, I am happy to report that the State Bar committee has met and recommended a statement in support of this bill. This position was then presented to the Executive Committee of the State Bar and unanimously approved. It, therefore, represents the position of the State Bar of Georgia in this regard.

We also recognize the urgency of this reform and revision of the Fifth Circuit Court of Appeals and urge favorable consideration of this legislation.

Respectfully submitted,

CUBBEDGE SNOW, Jr.

STATEMENT OF STATE BAR OF GEORGIA IN SUPPORT OF S. 2990

The State Bar of Georgia, acting by the Executive Committee of its Board of Governors and upon the unanimous recommendation of its Delegates to the Fifth Circuit Judicial Conference,

(a) Reiterates the opinion expressed in its statement filed last year with the Commission on Revision of the Federal Appellate Court System that action to relieve the appellate caseload in the Court of Appeals for the Fifth Circuit is urgently required and should be accomplished without further delay.

(b) Endorses and approves, as constituting appropriate, desirable and practical action toward the relief of such problem, the provisions of S. 2990, with amendments in the nature of a clean bill recently proposed by the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, which would divide the present Fifth Circuit into Eastern and Western Divisions and substantially increase the number of judges within each Division;

(c) Strongly urges prompt and favorable Committee consideration and the enactment into law of S. 2990 in the form of such clean bill; and

(d) Suggests, as a matter for consideration, the holding of a separate judicial conference within each Division of the Fifth Circuit, at least in alternate years, a procedure which would reduce the size of the Conference and the distance required to be traveled by many of the delegates, would permit more effective lawyer participation, and should result in a more effective conference.

STATE BAR OF GEORGIA,
Atlanta, Ga.

STATE OF GEORGIA,
Fulton County.

I, Omer W. Franklin, Jr., General Counsel of the State Bar of Georgia, and (in the absence of our Executive Secretary, Mrs. Grant Williams, who is presently hospitalized) custodian of the official records of the State Bar of Georgia, do hereby certify that the single sheet attached hereto, marked Exhibit "A" and, by this reference, made a part hereof, is a true and correct

Xerox reproduction of "Page Three" of the official minutes of a meeting of the Executive Committee of the State Bar of Georgia which was held on January 10, 1975, in the State Bar of Georgia headquarters, 1510 Fulton National Bank Building, 55 Marietta Street, Atlanta, Georgia, which page contains a Resolution regarding the division of the United States Court of Appeals for the Fifth Judicial Circuit, as formally adopted by the Executive Committee as aforesaid.

So certified on this the 4th day of March 1975.

OMER W. FRANKLIN, Jr.,
General Counsel.

EXHIBIT A

Now, therefore, be it resolved, That the State Bar of Georgia hereby approves and endorses the legislative proposal of the Commission on a National Institute of Justice that such a national institute be created and urges its creation by the United States Congress.

The president reported to the committee the unanimous recommendations of the State Bar delegates to the Fifth Circuit Judicial Conference with respect to the proposed reorganization of the Fifth Circuit as embodied in S.2990. Following discussion, motion was made and carried that the State Bar support and endorse S. 2990, and adopt the following statement to that effect:

The State Bar of Georgia, acting by the Executive Committee of its Board of Governors and upon the unanimous recommendation of its Delegates to the Fifth Circuit Judicial Conference,

(a) Reiterates the opinion expressed in its statement filed last year with the Commission on Revision of the Federal Appellate Court System that action to relieve the appellate caseload in the Court of Appeals for the Fifth Circuit is urgently required and should be accomplished without further delay;

(b) Endorses and approves, as constituting appropriate, desirable and practical action toward the relief of such problem, the provisions of S. 2990, with amendments in the nature of a clean bill recently proposed by the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, which would divide the present Fifth Circuit into Eastern and Western Divisions and substantially increase the number of judges within each Division;

(c) Strongly urges prompt and favorable Committee consideration and the enactment into law of S. 2990 in the form of such clean bill; and

(d) Suggests, as a matter for consideration, the holding of a separate judicial conference within each Division of the Fifth Circuit, at least in alternate years, a procedure which would reduce the size of the Conference and the distance required to be traveled by many of the delegates, would permit more effective lawyer participation, and should result in a more effective conference.

ALABAMA STATE BAR,
Dothan, Ala., February 17, 1975.

*U.S. Senator, Chairman, Subcommittee on Improvements
in Judicial Machinery, Washington, D.C.*

DEAR SENATOR BURDICK: As President of the Alabama State Bar I am pleased to forward to you an official Statement of Position of the Alabama State Bar as adopted by its Board of Commissioners relating to a division of the United States Court of Appeals for the Fifth Judicial Circuit.

The Alabama State Bar appreciates this opportunity to convey to you and the Subcommittee on Improvements in Judicial Machinery its official position and the noted suggestions therein. We urge your favorable consideration of our suggestions in this matter.

Sincerely

ALTO V. LEE, III, *President.*

Enclosure.

POSITION STATEMENT OF THE BOARD OF COMMISSIONERS OF THE
ALABAMA STATE BAR

IN RE THE DIVISION OF THE FIFTH CIRCUIT OF THE UNITED STATES

1. The Board of Commissioners of the Alabama State Bar Association are committed to the proposition that a division of the Fifth Circuit is necessary. The delegates of the Alabama State Bar to the Fifth Circuit Judicial Conference unanimously concur in that position.

2. We do hereby endorse proposed legislation S. 2990, with amendments in the nature of a clean bill, and respectfully urge early and favorable consideration of this bill.

3. The following amendments are respectfully requested:

a. Amend the proposed bill to provide for a Judicial Conference for each Division of the Fifth Circuit and make it discretionary by agreement of the Judicial Councils of the two Divisions to hold a joint Judicial Conference.

b. Amend the bill to eliminate the provision respecting a joint committee on rules in the Fifth Circuit.

c. The bill should be amended to make it clear that the two Divisions of the Fifth Circuit will have the full right to make cross-assignments of judges, senior and active, without the necessity of approval by the Chief Justice of the United States. Such amendment should apply to both Circuit and District Judges.

d. Montgomery, Alabama, should be designated as a place for holding court in the Eastern Division.

MISSISSIPPI STATE BAR,
Tupelo, Miss., March 4, 1975.

HON. QUENTIN N. BURDICK,
Committee on the Judiciary, Subcommittee on Improvements in Judiciary Machinery, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: This will acknowledge and thank you for the materials you have supplied me relating to the proposed reorganization of the Fifth Judicial Circuit. I appreciate also this opportunity to submit comments on the legislation from the Mississippi State Bar.

The position of the Mississippi State Bar has not changed since my appearance before the Subcommittee when I gave testimony relating to this legislation during September of 1974. At that time I advised the Subcommittee that our Bar strongly favored a division of the Fifth Circuit and an alignment of Mississippi with the States of Alabama, Georgia and Florida as a separate Circuit.

Our Bar continues to support and endorse the proposed legislation to divide the Fifth Circuit and we are appreciative of the efforts of you and the other members of your Subcommittee and staff.

With kind regards, I am

Very truly yours,

JAMES HUGH RAY, *President.*

LOUISIANA STATE BAR ASSOCIATION,
New Orleans, La., March 10, 1975.

Re Realignment of the Fifth Circuit.

HON. JOHN MINOR WISDOM,
Fifth Circuit Court of Appeals
New Orleans, La.

DEAR JUDGE WISDOM: Mr. M. Truman Woodward, Jr., advised me that you plan to go to Washington to testify before the Committee. Mr. Woodward suggested I forward a copy of the resolution adopted by our Board of Governors and respectfully ask that you be kind enough to reurge our position and file same with testimony.

With continued kindest regards, I am

Respectfully yours,

KENT BREARD, *President.*

Enclosure.

RESOLUTION

WHEREAS, the Commission on Revision of the Federal Court Appellate System has in its Preliminary Report of November 1973 invited comments and suggestions from all concerned with respect to said report, and

WHEREAS, the Board of Governors of the Louisiana State Bar Association is deeply concerned with the proposal contained in such Preliminary Report that the Fifth Circuit be divided into two circuits,

NOW, THEREFORE, BE IT RESOLVED by the Board of Governors of the Louisiana State Bar Association that it strongly urges that said Commission revise such recommendations so that it finally report that the geographical limits of the Fifth Circuit remain as presently constituted.

BE IT FURTHER RESOLVED that in the event that the Commission does not adopt the view of this Board, above expressed, its purposed revision be altered to include the States of Texas, Louisiana, Mississippi and Alabama in one circuit and the States of Georgia and Florida and the Canal Zone in another.

BE IT FURTHER RESOLVED that a copy of the resolution be duly forwarded to the Commission on Revision of the Federal Court Appellate System.

C E R T I F I C A T E

I certify that the above and foregoing resolution was adopted by the Board of Governors of the Louisiana State Bar Association at its regular meeting held on Saturday, December 1, 1973.

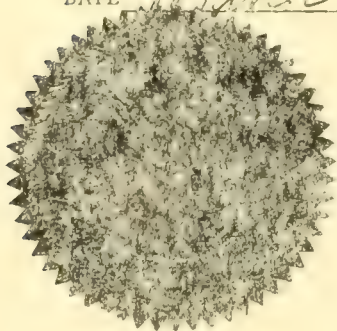
DATE

March 7/72

SIGNED

Thomas O. Collins, Jr.

Thomas O. Collins, Jr.
Executive Counsel and
Assistant Secretary
Louisiana State Bar Association



STATE BAR OF TEXAS,
Austin, Tex., March 14, 1975.

HON. QUENTIN W. BURDICK,

Chairman, and to the members of the Subcommittee on Improvements in Judicial Machinery, being a subcommittee of the U.S. Senate Committee on the Judiciary, Washington, D.C.

GENTLEMEN: The State Bar of Texas would like to express its views about S. 729, insofar as it would reorganize the Fifth Circuit by dividing it into two divisions.

The State Bar of Texas previously expressed its support to the Commission on Revision of the Federal Court Appellate System for one of the Commission's alternatives, which would have created two circuits from the Fifth Circuit. Under that proposal, Texas would have been in a new Eleventh Circuit with Louisiana, Mississippi and the Canal Zone. The new Fifth Circuit would have consisted of Alabama, Georgia and Florida. The policy reasons for supporting that plan were stated in a letter from then President of the State Bar of Texas, Leroy Jeffers, as follows: (1) The two emerging circuits would have been fairly equal in caseload, based on 1973 filings, and would likely continue to be so, according to the most reasonable projections. (2) The two emerging circuits would have been cohesive geographically; would have consisted of contiguous states and transportation facilities between the states were good. (3) No other existing circuit would have been disturbed and continuity would have been maintained by preserving the present alignments. (4) Variations in economies and viewpoints would have been maintained.

After considering S. 729, the State Bar of Texas now states its position on this bill. While this State Bar's reasons for its support for the Commission's proposal can be restated in support of S. 729, though not to the same degree, this Bar feels there are additional considerations respecting S. 729. These considerations are as follows:

(1) By dividing the circuits into divisions rather than creating new circuits and providing for the administration of such divisions, the bill creates a statutory basis for flexibility in accommodating any increase in caseload in the foreseeable future. It allows for an increase in manpower without sacrificing the efficiency and collegiality needed to foster consistent rendition of opinions within the appellate divisions. As the number of judges within a circuit or division becomes unwieldy, new divisions can be created without a minor upheaval of our Federal judicial appellate system.

(2) The bill will promote administrative efficiency by providing each division with its own chief judge, circuit executive, judicial council and control over designation and assignment of both circuit and district judges. Further administrative efficiency is provided by allowing the senior chief judge of a divided circuit to assign district judges across division lines.

(3) The bill would maintain consistency in the interpretation of laws within a single state's jurisdiction, through its conflict-resolving mechanism in using joint en banc panels. While this mechanism would only be applicable to California as the bill reads now, it accommodates other states which may be under the jurisdiction of two or more circuit divisions in the future.

However, the State Bar of Texas feels very strongly that the value of this conflict-resolving mechanism is greatly diminished without some guarantee that there will be adequate opportunity for oral argument before such a joint en banc panel. Oral advocacy is a traditional, vital and important element in the adversary process. The steady erosion of advocacy in general, and oral argument in particular, by Fifth Circuit rules and procedures is a trend toward the weakening of the whole adversary system. The State Bar of Texas strongly expresses its feeling that the conflict-resolving mechanism is such a crucial arena in the adversary system that the panel could not fully serve its function without the opportunity of hearing oral argument.

Additionally, we observe that unless oral argument is assured before the joint en banc panel that at least one third of this panel will receive any case without having heard any oral argument on that particular case.

Respectfully submitted,

LLOYD LOCHRIDGE, *President.*

STRASBURGER, PRICE, KELTON, MARTIN & UNIS,
ATTORNEYS AND COUNSELORS,
Dallas, Tex., December 9, 1974.

HON. QUENTIN N. BURDICK,
*Subcommittee on Improvements in
Judicial Machinery, Washington, D.C.*

DEAR SENATOR BURDICK: Thank you for the Committee Print of S. 2990 and the proposed Committee Report.

It is gratifying to see that additional circuit judges are contemplated. I have always felt that this was one of the prime needs and alluded to it before both the Commission on Revision of the Federal Court Appellate System and your subcommittee.

S. 2990 puts forth a workable plan to continue the judicial process rather than making it more than administrative process.

You and your subcommittee are to be commended.

Respectfully yours,

JOHN H. HALL.

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case

Circuit: Fifth

Circuit: Fifth

Type of Case and Opinion	Number of Cases	Average Time Appeal-Record (days)	Average Time Record-Last Brief (days)	Average Time Brief-Oral Argument or Submission (days)	Average Time A/S - Opinion (days)	Total Average Time Appeal-Opinion (days)	Remarks
Civil - Signed Opinion	74	59	74	140	125	378	
Per Curiam	87	60	75	62	74	271	
Memorandum	1	41	54	174	206	516	
No Opinion	5	75	100	93	15	283	
Private Civil - Signed Opinion	214	83	74	116	151	424	
Per Curiam	299	64	63	64	73	264	
Memorandum	1	81	54	133	121	389	
No Opinion	12	47	41	71	17	176	
Prisoner Pet. - Signed Opinion	71	69	74	83	115	351	
Per Curiam	330	48	68	47	41	204	
Memorandum	-	-	-	-	-	-	
No Opinion	10	74	72	37	17	200	
Criminal - Signed Opinion	101	85	71	73	106	334	
Per Curiam	315	64	65	33	45	297	
Memorandum	-	-	-	-	-	-	
No Opinion	3	50	50	94	17	211	
Admin. Agency - Signed Opinion	47	4	85	71	117	276	
Per Curiam	48	9	89	62	48	208	
Memorandum	-	-	-	-	-	-	
No Opinion	2	-	32	52	71	155	
Recapitulation							
All Signed Opinions	619	73	75	96	125	369	
All Per Curiam	1108	56	67	49	54	226	
All Memorandum	2	61	69	129	144	453	
All No Opinion	34	59	64	64	19	206	
Circuit Average	1763	62	70	66	58	276	

Senator BURDICK. With that, we will be in recess until tomorrow at 10 a.m.

[Whereupon, at 12:45 p.m., the subcommittee recessed to reconvene at 10 a.m. the next day.]

CIRCUIT REALIGNMENT

WEDNESDAY MARCH 19, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in Room 6202, Dirksen Senate Office Building, Senator Quentin N. Burdick [chairman of the subcommittee] presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. Today's hearing on S. 729 is the first of 2 days of hearings devoted to hearing the views of witnesses from the ninth judicial circuit concerning the provisions of this bill, which would divide the ninth circuit into a northern and a southern division. We will also consider printed amendment 132, which was introduced on March 17, and printed copies are not yet available.

When the subcommittee opened its hearings yesterday, I reviewed briefly some recent past history and referred to the fact that since the subcommittee first started studying the problem of the ninth circuit during the 92d Congress, the caseload in the ninth circuit has jumped from 1,936 cases to its present level of 2,697 cases. But more significant than this sharp increase in filings in the ninth circuit, and more significant than the fact that the ninth circuit court of appeals has employed the services of 60 or more visiting judges in order to cope with this workload, is the result of this great effort expended by all these judges.

The result to which I refer is the fact that despite the best efforts of those judges, the volume of litigation in the ninth circuit has produced unparalleled congestion and delay in the appellate process in that circuit.

When this subcommittee last held hearings on this problem in October of 1974, an exhibit prepared by the committee staff with the assistance of the Administrative Office of the U.S. Courts disclosed that the average time from notice of appeal to release of the opinion in the civil cases in which the United States was a party and where the case was decided by a full-blown signed opinion was 715 days. While that exhibit was prepared on the basis of 1973 data, we now have the benefit of data from fiscal year 1974 and as will be seen from the revised version of exhibit E-9 (see page 61, *supra.*), cases in the same category now require 747 days on the average from filing of the notice of appeal to release of the final opinion. The exhibit also shows

that private civil cases terminated by a signed opinion required an average of 739 days. Even criminal cases which are entitled to expedition required almost 11 months on the average where the case was decided by a signed opinion.

When the subcommittee last met on this proposal, it was considering the provisions of S. 2990 of the 93d Congress, which was a bill based upon the recommendation of the Commission on Revision of the Federal Court Appellate System that the ninth circuit be divided into two separate circuits, a new twelfth and a new, but smaller, ninth circuit. The proposal at that time provided that any conflict of decision between the new ninth circuit and the new twelfth circuit, each of which would have jurisdiction over appeals from two of the judicial districts in the State of California, would have to be resolved by the Supreme Court of the United States. At the hearings last October, representatives of the State Bar of California were most insistent that the proposal for conflict resolution by the Supreme Court of the United States would be inadequate to meet the need of California litigants. They expressed the desire to have, within the ninth circuit, a conflict resolving mechanism which would have the power to issue decisions which would have a binding precedent on all four of the judicial districts in California and upon the two divisions of the ninth circuit. After those hearings, the subcommittee's so-called clean bill was distributed which contained a provision for the convening of a joint en banc panel composed of judges from both of the divisions of the ninth circuit, which joint en banc panel would have authority to resolve conflicts which may develop for California litigants. Also the clean bill version contained a provision for a joint rules committee which would reduce the possibility of diverse procedural rules followed by the northern and southern divisions.

Thus, the proposal set forth in S. 729 is one which represents not only 3 years of work by this subcommittee but almost two years of study by the Commission of Revision of the Federal Court Appellate System. It also includes the joint en banc procedure and the joint rules committee provisions which were specifically designed to meet the objections made by the State Bar of California. In the next 2 days we will hear further testimony from and have the opportunity for further dialogue with judges and lawyers from the ninth circuit.

We have received a statement from Senator Howard Cannon of Nevada, which we will make a part of the record at this time.

[The material referred to follows:]

PREPARED STATEMENT OF SENATOR HOWARD W. CANNON

Mr. Chairman, thank you for this opportunity to present my views regarding S. 729, a bill proposing to reorganize the Fifth and Ninth Judicial Circuits. Since Nevada is now a member of the Ninth Circuit, and would remain so under Senator Burdick's proposal, I will confine my remarks to the Ninth Circuit.

S. 729 proposes to split the Ninth Circuit into two component sections; the Southern District which would operate primarily out of Los Angeles, and the Northern District which would be headquartered in San Francisco. While few will argue that reorganization of the Circuit is not long overdue, there does

seem to be much question regarding the location of the proper dividing line; whether Nevada should be included in the Southern or the Northern District, or for that matter; whether it should be split as is being proposed for California.

First, let me state that there will likely be short-term problems no matter what decision is made. However, I can foresee an even greater number of problems arising if Nevada is split such that half is in the Northern District and half is in the Southern. Administrative problems would no doubt arise. More cases would be dismissed due to errors in venue, breeding increased cost in terms of both time and money. Everything possible should be done to maintain the sanctity of each state as an entity. Based on this, the Committee can readily gather that I would be hard pressed to find justification for splitting Nevada internally between the Northern and Southern Divisions of the Ninth Circuit.

If my interpretation of S. 729 is correct, it appears to be more advantageous to the people of Nevada to associate entirely with the Southern Division. This would tie us in with Arizona and Southern and Central California. The 1975 Annual Report of the Administrative Office of the United States Court shows that out of 13,195 "civil" cases pending on June 30, 1974 in Ninth Circuit District Courts; 5,357 were in the jurisdictions proposed for the Southern District. The figures are somewhat reversed however when pending "criminal" cases are tallied. In that case the breakdown is 5,661 Circuit-wide, 3,898 of which can be attributed to the proposed constituents of the Southern District. Overall, a more even split could not be asked for at the District Court level.

While each and every District Court case has potential for appeal, a statistical analysis shows that proportionately only a very few cases are ever appealed to the Courts of Appeals. In the Ninth Circuit 2,697 cases were appealed in Fiscal Year 1974. Ninety-five of these appeals originated in Nevada. One thousand, one hundred and sixty-four originated in the proposed Southern District. This is 43% of the Ninth Circuit cases actually appealed.

Weighty consideration must also be given to other factors, such as that Nevada's population increase is percentage-wise the second highest in the country behind only Florida. No doubt Arizona is not far behind. Evidence of the growth factor is found in many forms. The number of bankruptcy filings is, for example, up 33% nationwide this year. In Nevada it is up 66%. The number of appeals to Courts of Appeals in Nevada has steadily risen since 1971. Between Fiscal Year 1973 and Fiscal Year 1974 however, they rose by 61%. There is little hope for a drop-off when one accounts for the general population shift from East to West and, in particular, to my home state.

A letter from my State Bar indicates that Nevadans are fairly evenly divided on whether they wish to be included in the Southern or the Northern District, but are in full accord that the Circuit must be reorganized. Those in the Northern part of Nevada, the main population center being in the Reno area, favor affiliation with the Northern District due to Reno's proximity to San Francisco. Those in the Southern part of the state have similar feelings regarding Los Angeles. Convenience, cost, and the travel time are no doubt the prime considerations; however, they fail to account for the most important factor—service!

It is my understanding that S. 729 would create five new judgeships for the Southern District and two for the Northern District. This means that by associating with the Southern District, Nevada would be served by a total of eleven appellate judges, whereas, by associating with the Northern District the number would be nine.

A desire for the best appellate judicial service possible would thus seem to mandate that Nevada be included in the tri-state Southern District as opposed to the multi-state Northern District.

For the record please note that Nevada's main population center is Clark County which is approximately 280 miles from Los Angeles; a 5½ hour drive at 55 m.p.h., or an hour's flight. It would be highly impractical for a Reno attorney and his client to drive the distance since another 400 miles would be tacked on, however the flight time would still be little more than an hour. Of course, the same considerations work in reverse. Clark County contains approximately 3/5 of the state's population and is the source of the greatest number of Ninth Circuit Nevada cases.

Mr. Chairman. I hope that this information assists you in achieving a functional reorganization for the Ninth Circuit. I have attempted to present objective considerations in an effort to point out the unique situation of my home state, a state of divergent views, sparse population, and massive physical size. Thank you for this opportunity to address the Committee.

Senator BURDICK. Our first witness today will be Thomas G. Nelson, president of the Idaho Bar, Twin Falls, Idaho.

Mr. Nelson, a number of years ago I had the privilege of being in Twin Falls. It is a delightful city.

STATEMENT OF THOMAS G. NELSON, PRESIDENT OF THE IDAHO BAR ASSOCIATION

Mr. NELSON. It is not a place you get to by accident, Senator.

I am Thomas G. Nelson, president of the Idaho State Bar.

I have given the staff a written statement which I will ask be included in the record.

Senator BURDICK. It will be included in the record, without objection.

[The material referred to follows:]

PREPARED STATEMENT OF THOMAS G. NELSON

Mr. Chairman, members of the Committee. My name is Thomas G. Nelson. I am a lawyer in Twin Falls, Idaho, and am President of the Idaho State Bar. The Idaho State Bar is an integrated bar, so all lawyers practicing in Idaho are members. The bar is administered by a four-man Board of Commissioners elected by the members.

The Board of Commissioners supports the plan of reorganization of the Ninth Circuit Court of Appeals, as set out in S. 729. We understand that the bill also involves reorganization of the Fifth Circuit, but since Idaho is in the Ninth Circuit, I will limit my comments to that circuit. Before writing this statement, I contacted the presidents of each of the local bar associations and found them to be in support of the views I express herein.

There seems to be little question about the necessity of taking some action to provide relief to the Ninth Circuit from the large and increasing caseload in that circuit. The question revolves around the form the relief should take. Certainly more judicial manpower is required, and some administrative changes also seem indicated.

The two division concept embodied in S. 729 appears to offer the best solution for providing the extra judges, and also retaining the elements of strength in the Ninth Circuit which has been of great benefit to the states involved. As I understand it, the judges of the Ninth Circuit are in favor of this proposal, with only a few exceptions. Since this is a question of administration, I accept their view that this is the best administrative solution.

The other alternative which has been suggested, that of leaving northern California in the Ninth Circuit and splitting the northwest states off into a new Twelfth Circuit appears to be a poor choice. From the standpoint of the basic problem, the remaining Ninth Circuit would continue to be unwieldy, since 83% of the load of the present Ninth Circuit would remain there. The problems of a 19-judge circuit outlined by the Chairman in his statement introducing S. 729 would still be present, so the basic problem is not addressed by the Twelfth Circuit proposal.

From the standpoint of the State of Idaho, the Twelfth Circuit proposal is unpalatable. Idaho's basic law has been oriented toward California since the time of Idaho's territorial days. To split the federal courts in Idaho off from California law in Ninth Circuit decisions would not be consistent with Idaho's history nor be in its best interests.

Another, and perhaps more compelling argument, is that the proposed Twelfth Circuit would probably only require the services of three circuit judges. A three-judge panel simply does not offer the opportunity for the

interplay of personalities and ideas as does a larger number. The new Twelfth Circuit would not provide the number or quality of decisions as would the Ninth Circuit, and it would probably be many years before the caseload increased to the point of requiring more judges. The question of whether the Twelfth Circuit is an acceptable alternative for this reason should be of concern to the lawyers of all the states proposed for inclusion in that circuit. The Board of Commissioners of the Idaho State Bar rejects the Twelfth Circuit as an alternative to the concept embodied in S. 729.

The federal judges in the Ninth Circuit offer a pool of trained judicial officers who can be assigned any place within the circuit where their services are needed, including the Circuit Court itself. This flexibility and ability to respond to changing needs is an asset to the Ninth Circuit. The splitting off of the northwest states would reduce the number of district judges available, since inter-district use of federal judges is not automatic, as I understand it, and thus reduces the ability of the Ninth Circuit to respond to the changing needs of the federal courts in the circuit.

S. 729 will probably not satisfy everyone, but it appears to offer the best solution with the least violence to the traditions and quality of the Ninth Circuit. The two division concept offers an opportunity for all circuit judges to participate fully in the work of the circuit, while the inter-Division *en banc* proposal avoids the unacceptable situation of having two rules of decision in California.

This bill is a good and workable solution to the problem, and we support it. Our position has been communicated to Senator Church and Senator McClure, with the request that they support it.

Thank you for giving me this opportunity to appear before the Subcommittee.

Mr. NELSON. Rather than read it, I might simply summarize it.

Idaho is not one of the major problems of the ninth circuit in terms of caseload, but we are vitally concerned with where Idaho would fit and vitally concerned with what happens in the ninth circuit.

It is our feeling that the interests of Idaho are best served by the ninth circuit remaining essentially as it is with the two divisions. Idaho has copied its law from California since Idaho was a territory. As a matter of fact, our criminal code has been known for years as the "scissors code" because we cut up the California code in order to draft it back in 1864.

I do not know that that is a particularly heavy argument as to what happens to Idaho, since I think we contribute about 1 percent of the load of the ninth circuit.

I have been concerned somewhat about the proposals for a twelfth circuit. I do not think that that particular proposal is in the best interests of any of the States in the present ninth circuit. In my judgement, the ninth circuit which has created for itself a reputation of good opinions and their opinions are of considerable weight. I think the twelfth circuit would be years in reaching that particular pinnacle, and you would certainly restrict the ninth circuit from access to the pool of judicial manpower.

I think one of the great strengths is the large number of judges available for needed assignments as the case loads change in the Federal district.

My statement is in the record. I would not go on any further.

If the chairman or the staff have any questions about the position of the Idaho State Bar I would be happy to respond to them.

Senator BURDICK. Thank you very much for your contribution this morning.

I have just two questions.

I want to thank you, Mr. Nelson, not only for taking the time and trouble to appear before the committee, but I want to both thank and congratulate you on the clarity of your analysis of the issues which the subcommittee must decide.

In your statement you indicated that not only the board of commissioners of the Idaho State Bar, but also each of the local bar associations support the proposals set forth in S. 729. Did these local bar presidents authorize you to state that fact to the subcommittee?

Mr. NELSON. Yes; I did ask them if they had any objections to my stating that, and I heard from all but I think one at the time I left Washington, and there was no objection.

Senator BURDICK. Thank you.

We have also received a letter from Mr. Douglas Drysdale, president of the Montana Bar Association, indicating that the Montana bar generally supports the proposal to divide the ninth circuit and, in the event of such division, the State of Montana desires to be aligned with that portion of the circuit which would be headquartered at San Francisco and also sitting in Portland and Seattle. Have you had occasion to discuss this proposed legislation with either Mr. Drysdale or other members of the Montana bar?

Mr. NELSON. Yes; we did discuss it generally with Mr. Drysdale and other delegates from Montana. As I remember their position, even though they are not a community property State, their feelings are much the same as Idaho's, that they feel their best interests are with the ninth circuit with the division concept.

Senator BURDICK. I believe the staff has a question.

Mr. WESTPHAL. Mr. Nelson, as you attempted to summarize your prepared statement, you said that the interests of Idaho would be best served by having the ninth circuit remain as it is with two divisions. Now, could you clarify it?

Mr. NELSON. What I meant to say, and I probably said it very badly, was we would prefer to see the ninth circuit remain in the same geographic area so that we would remain a part of the ninth circuit as presently constituted, so that even though there would be two divisions we would have the benefit of what is frankly the California bias or leaning of many of the ninth circuit decisions.

Mr. WESTPHAL. And as you understand the provisions of this bill, S. 729, it would reorganize the ninth circuit into a northern and southern division rather than splitting it into a separate twelfth circuit and a separate new and reduced circuit?

Mr. NELSON. That is my understanding.

Mr. WESTPHAL. And in that alignment Idaho would be part of the proposed northern division and would therefore retain those ties to California which you have indicated were important to Idaho lawyers because of the fact that part of your civil code has been borrowed from the State of California; is that correct?

Mr. NELSON. That is correct.

Mr. WESTPHAL. You indicated that one of the factors that entered into the decision of your board of commissioners to support this bill was the fact that within the ninth circuit states, all nine in number, there is available what Judge Chambers always refers

to as the blood bank, and do you understand that under the provisions of S. 729, notwithstanding that the circuit is reorganized into two divisions, that the senior chief judge would still retain the power to assign judges from one division to another, both at the district level and or at the circuit level?

Mr. NELSON. That is my understanding. I think that is one of the real advantages to this concept.

Mr. WESTPHAL. Your statement indicates that your board of commissioners, before arriving at its position to support this bill, considered other alternatives, such as—well, you mentioned splitting the Northwest States off into a new twelfth circuit, which would not include any part of California, but you would leave northern California attached to southern California and the balance of the circuit. What were the reasons why your board of commissioners did not feel that that proposal was as acceptable as the first one set forth in this bill?

Mr. NELSON. First, of course, would be the strength of courts from California. Second, the twelfth circuit would be very small and probably would justify no more than three judges on the circuit panel. I do not think a three-judge circuit is big enough to get the entire play of mobility and personality. One strong judge would run that circuit very easily, and selfishly, I think. Idaho might have a circuit judge about every 100 years under that system, and would simply be overpowered by Washington and Oregon in terms of size. I think that would be true of Montana and Alaska, likewise.

I think the real disadvantage in splitting up the circuit is in eliminating the flexibility. You have eliminated that many district judges and that many circuit judges from the ninth circuit.

Mr. WESTPHAL. In discussing this matter with various Idaho lawyers and in the discussions within the board of commissioners, plus these conversations you had with the presidents of local bar associations within Idaho, did you glean any impression from talking to those lawyers as to whether they are dissatisfied with the type of congestion and delay that exists in the ninth circuit today as described by the chairman in his opening statement?

Mr. NELSON. Well, I think it is a unanimous feeling of those lawyers who have business before the ninth circuit that something has to be done. If you have a nonpriority civil case in the ninth circuit—and I understand there are something like 100 different calendar priorities that the circuit has to face—you are looking at a delay much greater than the average that the chairman mentioned. You are looking at perhaps 3 years.

Some of these civil cases, even though nonpriority, are certainly of great significance, not only to the litigants, but to the other Western States.

There are a couple of water questions now pending in the ninth circuit which could have great impact on many of the states in the West. They have been sitting there for 18 and 24 months respectively, and I am not being critical of the ninth circuit, but that sort of delay when other rights and other cases are awaiting that decision simply does not do much for the problems that we face.

Mr. WESTPHAL. That is all the questions I have, Mr. Chairman.
 Senator BURDICK. Thank you very much.

Mr. NELSON. Thank you.

Senator BURDICK. Our next witness is Judge Shirley M. Hufstedler, Ninth Circuit Court of Appeals, Los Angeles, Calif.

Welcome to the committee, Judge.

STATEMENT OF JUDGE SHIRLEY M. HUFSTEDLER, NINTH CIRCUIT COURT OF APPEALS, LOS ANGELES, CALIF.

Judge HUFSTEDLER. Good morning, Mr. Chairman, gentlemen.

You have heretofore been furnished copies of the prepared statement, and I would like to submit that for the record at this time.

[The material referred to follows:]

PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER, CIRCUIT JUDGE, U.S. COURT OF APPEALS, NINTH CIRCUIT

Mr. Chairman and Members of the Subcommittee: I fully support the premises of S. 729 that the Ninth Circuit is seriously overburdened, that the court presently needs 20 active judges to carry the load, and that existing en banc mechanisms are inadequate to maintain intracircuit decisional harmony. I nevertheless must oppose the bill because the division will (1) increase the appellate litigation in the circuit, (2) impose unjust and unreasonable burdens on the citizens of California, (3) increase the burdens of the Supreme Court, (4) escalate en banc proceedings, (5) generate serious problems for which the bill provides no answers, and (6) increase systemic and dollar costs without offsetting benefits.

The bill is built on the foundation of two unarticulated assumptions, both of which are wrong: (1) The only state adversely affected by the split is California which is cut in two, and (2) the problems created by splitting California can be resolved by the "joint en banc panel."

The fallaciousness of these assumptions can be demonstrated by a concise illustration: In a case arising in Oregon, the Northern Division holds that a federal tax statute as applied to taxpayer *A* is unconstitutional. Taxpayers identically situated to *A* are located in San Francisco, Los Angeles, and Arizona. *Stare decisis* will bind the San Francisco taxpayer to the Northern Division's decision. The taxpayers in Los Angeles and Arizona are not thereby bound. Taxpayer *B* in Phoenix makes the same constitutional challenge to the statute. The Southern Division holds that the statute is constitutional as applied to him.

1. Can Phoenix taxpayer *B* seek a resolution of the conflict by the joint en banc panel under section 1291(b) which limits joint en banc panel jurisdiction to "any decision by a division of that circuit which is in conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, state or federal, *which affects personal or property rights in the same state*"? (Emphasis added.) Or is taxpayer *B*'s sole remedy a certiorari petition to the Supreme Court?

2. Does the joint en banc panel have jurisdiction to resolve the conflict by sua sponte action, and, if it does have jurisdiction, does it have any obligation to exercise it?

3. Los Angeles taxpayer *C* appears to have no standing to seek any relief because he is not a party to either the Oregon or the Arizona action. How can he obtain a resolution of the conflict? Of course, he can relitigate the issue in the Tax Court (which may or may not be bound to follow one division's decision rather than the other), or in the district court within the Southern Division in which he must lose because the district court is bound by the decision in the Arizona case. He can then appeal to the Southern Division, which is likewise bound to its prior decision, unless it takes the case en banc. Suppose the Southern Division rejects his en banc suggestion. Does the joint en banc panel then have jurisdiction to entertain his petition to it to

hear the case en banc to resolve the interdivision split? Or is his sole recourse to petition the Supreme Court for certiorari?

Suppose that taxpayer *C* has conducted identical transactions in both San Francisco and Los Angeles—a very common phenomenon in respect of corporate taxpayers. During all the months and even years consumed by all of this litigation, what law must *C* follow in filing his tax returns?

4. Is the Government bound either by collateral estoppel or by stare decisis in the Southern Division by the adverse decision in the Northern Division?¹ Does it have any standing to seek joint en banc panel determination of the Northern Division's adverse decision? If it has standing and if the joint en banc panel has jurisdiction, does the Government have any obligation to suggest en banc hearing (a) before the Northern Division's internal en banc court, or (b) before the joint en banc panel, with or without prior en banc application to the Northern Division?

The questions raised by the illustration and its variants are serious and pervasive. The problems will recur constantly because decisions interpreting and applying the Federal Constitution, federal statutes, federal administrative orders, rules, and regulations constitute the bulk of the work of this circuit, and all of the federal law necessarily flows across the California fracture line and permeates every corner of the circuit. The bill confronts none of these problems and answers none of them.

Moreover, the bill fails to recognize that the division inherently generates litigation at both district and appellate levels for three reasons: (1) the split breeds conflict and uncertainty, and conflict and uncertainty always breed more litigation; (2) losers with the motivation and ability to relitigate an issue lost in one division will relitigate in another to work up a conflict for resolution by en banc proceedings, certiorari petitions, or both (litigants in this category abound in the circuit, e.g., federal and state governments in all of their many capacities, big corporations, taxpayers, class litigants, conservationists); (3) the existing curb on conflict due to the obligation of all judges in the circuit to follow the prior law of the circuit unless it is overturned en banc² apparently is intended to be removed between divisions, with the exception of the decisions by the joint en banc panel. I say "apparently" because, while the bill does not directly address that question, the jurisdictional limitations on the joint en banc panel suggest that that is the intent, and commentary of the draftsmen to the effect that the division is expected to relieve non-joint en banc panel members of the burdens they now have in maintaining intracircuit harmony reinforces the suggestion.

The effect of the division and the fragmented en bancing procedure is to shift the burden of maintaining intracircuit harmony from the circuit court to the litigants and to the Supreme Court. The Supreme Court cannot absorb the added burdens. The litigants have little motivation and little or no means to maintain interdivisional harmony. Litigants are interested in winning lawsuits, not in maintaining institutional harmony. The burden falls especially unjustly and unreasonably on the people of California, who will be forced to file two or more appellate proceedings in every case in which a key federal law issue has been decided differently by the two divisions. Moreover, when the conflict has arisen in the circuit through cases originating in states other than California, they may have no jurisdictional access to the joint en banc panel, and they may be remitted solely to the Supreme Court of the United States. They are further unreasonably burdened when California law issues have been decided differently by the two divisions because they must both appeal to the division and suggest hearing by the joint en banc panel. If the joint panel rejects the suggestion, access to the Supreme Court is closed for want of a federal question, and they would then have to relitigate the issue through the state courts of California if they can avoid preclusion by res judicata. How can the citizens and governmental entities of California sensibly

¹The collateral estoppel issue is difficult in the intercircuit context (e.g., *Divine v. Commissioner of Internal Revenue* (2d Cir. 1974) F. 2d [No. 73-1732] holding that the Government was not precluded from relitigating a tax question in one circuit that it had lost in another). It is even more difficult in the interdivisional setting because there is no guidance at all on the question.

²The nature and extent of the obligation of judges of the Ninth Circuit to maintain integrity of the law of the circuit by following prior decisions unless they are overruled en banc is accurately described by Alexander, "En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities," 40 N.Y.U.L. Rev. 563 (1966).

plan and conduct their affairs in this situation? Why should they be forced to do so? Why should this jurisdictional and procedural morass be created?

The assumed justifications for creating all of these problems are: (1) the split will reduce circuit overburden, (2) it will permit the court to function in small units, and (3) a circuit with more than 10 and as many as 20 judges is inherently unmanageable, or is manageable only with untoward difficulty. The assumptions are demonstrably unsound.

The split will elevate the litigation burden for reasons heretofore mentioned. The small unit function is illusory, because the split will force continuous en bancing both within the divisions and across division lines. Finally, circuit courts of more than 10 and as many as 20 judges are not unmanageable.

The Ninth Circuit has operated effectively, although imperfectly, with more than 3 times 20 judges for several years. Last year our court used the services of 75 judges. In 1973 we used 66 judges. Our active judge complement is 13. In 1974 we had 13 active judges and 4 senior judges, until Judge Merrill took senior status last Fall. We had 59 different visiting judges, the great majority of whom are active district judges from our circuit, who left their own trial calendars to assist us by sitting with us one or two days during one or more of our monthly calendars during the year. The other visitors were senior district judges from our circuit and other circuits, and out-of-circuit senior circuit judges assigned to sit with us for five days on one or more of our monthly calendars. With occasional exceptions, one out of every three panel members has been and now is a visiting judge.

No one suggests that any court can operate with optimal efficiency with 13 full time judges, 4 part time judges, and 59 visitors whose regular duties are elsewhere and whose services turn over from week to week and even from day to day. We know that this is not a desirable way to run a court, any more than it would be a desirable way to run a congressional office. We have been driven to this system because our court is seriously and chronically understaffed. The key point is, however, that the court is being effectively managed in spite of the large number of judges and the turnover. The logistical and administrative problems involved in managing a 20-member full time judicial complement are very slight as compared with the present administration of a constantly shifting group of 75 judges from all over the nation.

A 20-judge court can be managed every bit as effectively and efficiently as a 10-judge court as long as management methods are adjusted to accommodate the larger size. Panel assignments, locations, and times of sitting can be adjusted to reach the results of division with no split of the circuit and with none of the added systemic and dollar costs.

I appreciate the affection for the small court concept, and I share the reluctance of judges to change the internal operating procedures of our courts with which each of us is comfortably familiar. The attachment, however, is a luxury that we can no longer afford because the demands on our circuit cannot be met while we cling to our old ways.

Our situation can be illustrated by an analogy to the development of law firms. A 9-lawyer firm is a pleasant working organization. Without much difficulty, every lawyer can keep himself informed of the work of every other lawyer in the firm. The firm does not need an administrative partner or an office manager. The 9-lawyer firm can occasionally accept a very large, complex lawsuit, but it cannot undertake several complicated lawsuits in a single year. If several complicated lawsuits are offered to the firm, it must either hire more lawyers or turn away the new clients. If it accepts the litigation, the firm must grow rapidly to 15, 20, or more lawyers. Law firms of 20 or more lawyers can and do operate very effectively; indeed their operations can be much more efficient than a small firm, but they do not manage themselves in the same way as do small firms. The analogy between the law firm and a circuit court holds true with one critical exception: Law firms can remain small by choosing to reject more litigation. Circuit courts do not have that choice.

During the last decade California has experienced explosive growth of law firms and of extremely complex litigation. Our court cannot process the resulting caseload with the judicial personnel and the internal operating procedures that sufficed in bygone days when caseloads were much lighter and simpler.

In briefest compass, here is a partial list of the systemic and dollar costs that circuit splitting engenders:

(1) Appellate litigation will increase in both divisions; unsettled law always promotes more appeals.

(2) Litigation in the district courts will increase by reason of forum shopping and relitigation of issues lost in the other division.

(3) En banc proceedings will multiply rapidly, both in suggestions for en banc hearings and in en banc hearings necessarily granted, within divisions and interdivision.

(4) The people of California will be in constant uncertainty about how to plan their actions because they will be unable to predict what law will be applied to them.

(5) Final decision of pending appeals will be further delayed while en banc petitions are filed and while awaiting the results of numerous en banc hearings granted.

(6) The additional legal work and the extended delay will escalate the costs to litigants; California litigants will be particularly oppressed.

(7) Burdens on the Supreme Court will be increased.

(8) A new circuit executive will be added and a new clerk's office will have to be created, staffed, and housed.

What are the benefits?

(1) A few of the judges who are not members of the en banc panel may save a little travel time.

(2) Meetings of the Circuit Council may be slightly shorter if 10, rather than the present 13 or the projected 20, attend.

I omit from the benefit column any saving of individual judge's time by reason of the participation of less than all judges in interdivision en bancs because any benefit that could flow from a new en banc mechanism is a function of that change and not a function of circuit division.

The cost-benefit ratio would be dramatically altered if the divisional concept of S. 729 were abandoned, the circuit was left intact, and its two highly meritorious features were retained: (1) the addition of 7 more active judgeships to the circuit and (2) the 9-member en banc mechanism was expanded to include all intracircuit conflicts.

Judge HUFSTEDLER. Because of the overall recognition that is contained in this bill, S. 729, of the serious problems of the Ninth Circuit, this is a matter of great importance, and I think essential to doing something about our problems. I am rather unhappy to have to say this, because it is true that we must have 20 active judges to carry the burdens of the Ninth Circuit.

Moreover, I think it is also true that the proposal for an en banc mechanism is a highly valuable one. I have some specific suggestions about the composition of that panel which I will address myself to a little later.

But it seems to me as a concept of judicial sitting, upon analysis of how it will function, I have come to the reluctant conclusion that it creates a great deal more problems than it resolves, and that the costs vastly exceed the benefits which can be thereby achieved.

The fundamental premises upon which this concept was erected, it seems to me, are that a circuit of more than 10 judges becomes inherently unmanageable, and that therefore there must be some means of division to keep a circuit down to this so-called optimum size.

Second, the problems generated by the split of the circuit into divisions can be successfully resolved by the joint en banc panel mechanism. I think both of these premises are wrong, and I think they can be demonstrated to be wrong.

As Senator Burdick has fully pointed out, last year our court used the services of 75 judges. That is an enormous load of judges,

and the difficulties of management of that mechanism with judges who are with us sometimes only for 1 day or 2 days, or 3 days, create management problems of extreme difficulty.

But if we had 20 active judges, to use the vernacular, management would come to a snap.

It is quite true you cannot manage your affairs identically when you have 20 judges as you can when you have nine. But that means really only an adjustment of the general operating procedures of the court. That means some difficulty, but it is by no means unseemingly difficult.

It seems to me that one of the difficult factors that was overlooked in the divisional concept is that the division, particularly of the State of California, will create continuing uncertainty and will generate litigation, both in the district courts and in the circuits.

Moreover, the proceeding contemplates having three different en banc mechanisms, one intradivisional en banc mechanism and then the joint en banc mechanism.

What this means, among other things, is that individual judges who are qualified to sit on the joint en banc panel, and of course were also qualified to sit on intradivisional en banc panels, can end up seeing the same case three times, first being on the panel itself, next on the en banc mechanism within the division, and third on the intercircuit or interdivisional en banc panel.

Frankly, I think that is a colossal waste of judicial time. At the present time, at maximum, a judge will sit twice and it is a relatively rare circumstance, because there is an obligation within the court that each member of the court must follow a decision within the circuit unless the matter is taken en banc. We regularly follow decisions with which we do not particularly agree, because we follow the discipline within the circuit.

But when you divide the circuit there is no need, nor is there any obligation, for the members of the southern division to follow the northern division, and if there were you are exactly where you started from in terms of the overall burden in keeping up with the court.

It seems, therefore, to me, that the problem should be faced more directly by keeping the circuit together and giving us the help we need without making any divisions or cuts. Indeed, the concept of the bill is contrary to the concept developed in judicial systems across the country, which is not to break up into more little pieces, but to put more little pieces together. That is true when you are talking about judicial systems. It is also true when you are talking about municipal governments.

Moreover, it was suggested, I think in the early days of this bill, that the only real problem created by dividing California would be difficulties probably in diversity cases in which you would have differing decisions of the two divisions about California law. That, again, in vernacular is a drop in the bucket. The real problem is that the law of the circuit, which is being made daily and which is the primary burden of the court, is the interpretation and application and construction of the Federal constitution, of Federal statutes, rules, and administrative orders. There is no possibility of pre-

venting decisions in cases of this kind from waffling from one side of the division line over into the other division.

It seems to me, in that particular that we would be faced with continuing and constant en banc, interdivisional, and across-division lines.

For example, a panel in the Northern division decides a case one way, a panel in the southern division decides it another. First, there would be an effort, I presume, to resolve the conflict by virtue of requiring an en banc intradivisional hearing. But suppose they adhere to the position that their prior panel determination made? Then you face the same problem in the southern division with another en banc proceeding before that division, and suppose there is still not a resolution. Then finally you must have a joint en banc panel undertake the problem, and I must say I think there is built into that a need that there will be a division within the joint en banc panel, because people do not yield to decisions they have taken once or twice or three times. It seems to aggravate the problems we presently have and creates problems within the divisions themselves of following a decision upon which a majority of the judges of the opposite division have reached a contrary conclusion. That in turn generates more problems, potentially resolvable only by the U.S. Supreme Court.

Rather than go into a recital of each and every one of these things, I would appreciate it if you would care to question me about any phase of this.

Senator BURDICK. Thank you very much for your testimony, and you will have some questions.

Judge. I have listened to your testimony with great interest. In your testimony, you have reiterated your opposition to the proposal to split the ninth circuit and more particularly to the so-called splitting of four judicial districts in California.

The reason I have listened with such interest is that the testimony which you have given here today seems to be at great variance with the testimony which you gave before the Commission on Revision of the Federal Court Appellate System on August 31, 1973, at a commission hearing in Los Angeles. I would like now to quote from your prior testimony on that occasion:

In summary, I believe that circuit splitting makes bad problems worse without solving anything. If the Ninth Circuit is nevertheless to be split, we are obliged to try to find the least harmful way to do it. The less of a bad thing, the better. Therefore, I would divide the Ninth in twain and no more. The place to begin is California because California produces the intractable case load. Two proposals have been made: Create a circuit of California only or cut California in two. If the object of division is to distribute caseload and to keep a circuit close to the mystical 9, the latter is the only effective method, because the present California appellate litigation together with the anticipated increment will outstrip the capacity of 9 to handle the whole state. I would make the cut in the mid San Joaquin Valley. The Northern Ninth conveniently includes the Pacific Northwest, Alaska, Montana, and Idaho. The Southern Ninth annexes Nevada, Arizona, Hawaii, and Guam.

Judge, does your testimony today indicate that you have changed your mind from the position you took before the revision commission?

Judge HUESTEDLER. No, it does not, Senator Burdick. The reason is, as I stated in that statement and I elaborated on it earlier, I

disagree with the premise that we must keep a court to nine or close to nine. I disagree with that thought.

If, however, I am forced to accept the premise, whether I agree or not, that you should not have a court of more than 10, then it is not possible to handle the case load in California without dividing California. It is that simple.

But the premise is wrong. As usual, you know, if I give you the premise then you win the argument; if you give me mine, I feel I can win.

Senator BURDICK. While we are on that subject, do you not think there is a point beyond which a court begins to operate inefficiently with too many judges?

Judge HUFSTEDLER. Of course, but I do not think that point has been reached, and if and when it does then one must confront the much more serious and basic problem which is Congress' penchant for giving more business to the Federal courts and never taking any away.

Senator BURDICK. This committee has been trying to take some away. This committee has been very active in trying to get rid of three-judge courts.

Judge HUFSTEDLER. I thoroughly commend the subcommittee, and I was not pointing my finger at the subcommittee, but at Congress generally.

Senator BURDICK. Since the California bar has been opposing this bill, I do not see them coming in with a resolution to change diversity jurisdiction.

Judge HUFSTEDLER. Well, you are going to find a good deal of division within the State bar on questions of that kind, and I do not purport to speak for them, nor am I going to offer a defense for something I do not believe in, which is the maintenance of Federal diversity jurisdiction.

Senator BURDICK. The point is, if we do not change diversity jurisdiction, if we do not get rid of three judge court procedures, if we do not do these things, there is only one thing we can do—create more and more judges. Do we not reach a point that economists call diminishing returns?

Judge HUFSTEDLER. I think you will eventually, but I can not agree that a circuit court of 20 is too many or unmanageable. It is not any more unmanageable than the Senate when it used to have 40 Senators and now has 100 Senators.

But it is quite true that when you do business in the Senate today you do not do it identically to the course of conduct when we had a much fewer number of States. You have individual hearings, you do not sit on every single question. I think that is true in handling a court. There is nothing unreal or unmanageable about having a 20-judge court.

We need the manpower, and I think the proof of that pudding is that, even though we are not doing it perfectly, we are in fact managing 75, and a court of 75 in which your personnel turn over constantly creates extreme difficulties that are entirely avoided when you have a bench of 20 judges.

Senator BURDICK. There is some question in my mind at least about your operating efficiency with all those extra judges coming in for 1 day or 2 days and flying out again.

Judge HUFSTEDLER. Senator, it is not efficient, but at the same time we have to get our blood where we can create a transfusion, and when we are having to rely on the services of district judges because we do not have enough bodies otherwise, and I do not mean that in any derogatory sense at all, but we can not take them from their own calendars. It is a very bad system, but we must have the manpower, and since we have not had the manpower of our own we have had to do a cut-and-paste job to get the courts going. If we get the judges we can do a much more efficient job.

Senator BURDICK. Do you really think that 20 judges can turn out per judge the same as 11 or 15?

Judge HUFSTEDLER. Yes; I do.

Senator BURDICK. I think the record will dispute you.

Judge HUFSTEDLER. Everybody is not going to agree with the other person's statistics, but in terms of the experience we have right now, reminding you of 75 judges, it is my experience, and I think the statistics will bear me out, that each judge produces about the maximum of opinions he or she can produce, no matter how many judges you have on the court. A kind of par is the court's average on the California Court of Appeals of approximately 100 opinions or memorandums per judge per year. That really does not seem to change very much whether or not you add or subtract judges.

Senator BURDICK. Do you not think it impairs the efficiency of the court when you have 20 judges rather than 11? Does every opinion not have to be floated and circulated around to 20 people as against 11?

Judge HUFSTEDLER. The opinions are not circulated prior to filing in the ninth circuit anyway. To the extent that is a problem, it is a problem that does not go away under S. 729, because each judge has some responsibility to keep up with the law in the other division. He must do so because it will be called to his attention regularly by way of petitions for internal en banc hearing when the other division has decided the particular issue.

Senator BURDICK. But you have a great bulk of your cases that are disposed of on law in which there is no dispute between the two circuits or the two divisions?

Judge HUFSTEDLER. That is entirely correct, Senator Burdick, but when you begin to create the conflicts which are intrinsic in this plan you are going to escalate the number of en bancs very, very greatly, both internally and divisionally.

Senator BURDICK. Let's continue with these questions informally, Judge.

In any event, after you gave that testimony in Los Angeles you were asked these questions and gave these answers when Senator Hruska questioned you, and I quote:

Senator Hruska. Judge Hufstedler. I just listened with great interest to the idea that—one of the problems is to avoid conflicts on circuits.

Judge Hufstedler. Right.

Senator IRUSKA. And it is not a way to do it, by either adding more circuits or more judges.

Judge HUFSTEDLER. That is right, because all you do is create more conflicts without, at the present time, any existing intracircuit mechanism other than the Supreme Court.

Now Judge Hufstedler, my question to you is this: Does S. 729 provide a mechanism for resolving intracircuit or interdivisional conflicts by other than the Supreme Court?

Judge HUFSTEDLER. It does in part, but it does not go the whole distance.

Rather, the interdivisional mechanism provides a mechanism short of the Supreme Court, but because of the problems I have already mentioned, I do not think it is going to spare the Supreme Court that much work, not only because of the conflict-generating problem I earlier mentioned, but because the bill as presently drafted simply provides no mechanisms for some of these, and I would ask you please to look at the provision of the bill which limits the en banc mechanism to resolving conflicts within a state. When the conflicts involve more than one state, which they necessarily will, the present draftsmanship does not even reach those conflicts.

Senator BURDICK. Thank you for calling it to our attention. We can make the correction.

Judge HUFSTEDLER. If you make that correction you can resolve them all and you are right back to square one, in that I think the most desirable feature of this bill, aside from the additional judges, is the creation of an en banc mechanism for less than the entire court. That is a highly valuable contribution. I think we could make a good thing there by altering the design very modestly, which is to say that the en banc panel for the entire circuit, your interdivisional panel, would consist of 9 judges, the number one judge always to be the chief judge of the circuit unless he is eligible to retire, and the next 8 to be initially all those who were senior in point of service not eligible to retire, but that every 6 months one judge would be rotated off the en banc panel. For the purpose of rotating off it does not make a great deal of difference whether you start it off at the number two judge or take it at the number nine judge.

The net product would be that each judge would serve approximately $4\frac{1}{2}$ years on that panel, but you would have a rotation in such a way that the other members, junior and senior, would gradually be worked into the panel.

But I would cut off the rotation to the point that you would not dip in rotation below the point at which the active judge had less than 2 years of service on the court. It can be handled in a mechanical way rather simply, numerically, so that there is certainty that it will give the stability that is required to make the mechanism attractive and to work. It does not lock people into the situation of en bancing while depriving the juniormost in service of an opportunity to sit on the en banc panel.

But with that kind of addition I think it is a very effective means of resolving what is otherwise a very hard question.

Senator BURDICK. We will follow you and listen to your recommendations with great interest. We will give that consideration, you can be sure of that.

Well, let's go on with this little thing that I am reading to you. You were asked the following questions at the Los Angeles hearing: Judge Sulmonetti: "Judge Hufstedler, do you think that a judicial system can be so large that it finally reaches a point where it lacks the capacity to govern itself, and that you get more efficiency when you break the system down into more manageable units?" Judge Hufstedler: "I am not prepared to say that there is not a breakpoint on it, but nobody's proposals with respect to circuit splitting really meet that problem. It seems to me that the curse of excess is to feed less into the system. Granted, you finally reach a point, my illustration is the New York area, in which you have essentially an unmanageable city, but breaking up the city, unless you could move it physically apart, does not really resolve the problems." Judge Sulmonetti: "Can you produce greater efficiency by breaking a system into more manageable units? I think this has been demonstrated." Judge Hufstedler: "Well, in some respects you can, and in some respects you cannot."

I suppose your testimony today is that in this case, it is the respect in which you cannot?

Judge HUFSTEDLER. Well, that is right. I do not think there is any inconsistency at all between what I said then and what I am saying now.

Senator BURDICK. But you recognized there was a breaking point?

Judge HUFSTEDLER. That's right, but this is not it.

Senator BURDICK. Well, not too many years ago the eighth circuit got a little overburdened and we created a tenth circuit. Do you think that was a wise move by Congress?

Judge HUFSTEDLER. I think that old solutions to old problems sometimes work very well, but when the problems change you have to change your solutions.

Senator BURDICK. But sometimes the methods that have been used in the past and have proved successful might be a guide to the future, too.

Judge HUFSTEDLER. Indeed they may and can and are, Senator Burdick. We can put it the other way. If 13 circuits are good and 15 are better would not 25 even be better than that. You can overdo even a good thing, and sometimes it creates more problems than it resolves, which is true in this instance. Particularly indefensible to me is the splitting of California. There is no reason to impose the kinds of burdens that are placed upon California citizens and lawyers and judges by the split. It is a split I have never endorsed except from sort of a mathematical servitude that if you are going to divide a caseload evenly and you must have 10 judges then you must divide California.

What I was trying to argue: does that not mean you have to examine the original premise?

Senator BURDICK. I understand.

Well, you would like to add 20 judges to the circuit?

Judge HUFSTEDLER. I would not add 20, sir—

Senator BURDICK. I mean add until you get 20?

Judge HUFSTEDLER. Yes.

Senator BURDICK. What is your solution as to en banc number under those conditions?

Judge HUFSTEDLER. Precisely the one that has been outlined in S. 729 with modification I have heretofore suggested of having rotation of the en banc panel of one judge every 6 months.

Senator BURDICK. Judge, I will turn you over to the staff for a few extra questions.

Judge HUFSTEDLER. Thank you. I should have issued an instantaneous disclaimer. I think it is always built into these conversations.

I, of course, do not purport to speak for the ninth circuit. I speak for myself.

Mr. WESTPHAL. Judge, you and I have discussed this problem in the company of many others trying to come up with the answer to something which is a considerable problem. Is that not true?

Judge HUFSTEDLER. We have indeed, Mr. Westphal. You have been very generous in listening a lot.

Mr. WESTPHAL. Now, the dimension of that problem is that with a caseload of some 2,700 cases, approximately, in the ninth circuit, a caseload which just in 3 short years has grown by 700 cases, your court has indeed been overwhelmed, has it not?

Judge HUFSTEDLER. That is correct.

Mr. WESTPHAL. In an effort to meet that caseload you have resorted to the calling up of district court judges, both active and senior, to sit as a member of a three-judge panel. You have used all the services of visiting judges from other circuits that you could possibly obtain. Can you give us any estimate of what the equivalent judgeships would be for all these supernumeraries that you employ in the ninth circuit? What has been the equivalent judgeships from all these judge hours and judge days and judge sittings that you used?

Judge HUFSTEDLER. Mr. Westphal, if I had the power to program a computer and feed it data, I could probably give you the answer, but now I can not, because there are too many variables for me to compute at this time.

We lose a great deal of time in trying to deal with people whose primary job is not serving our court, so that you can not compute it simply on the basis of how many sittings per case or per day, because you lose so much in terms of trying to acquaint the visiting judge with the procedures of the court and all the negotiations that go on after or during an argument.

So without being able to feed in these innumerable variables I do not think you can come out with a very sound figure. It can be done, but I cannot do it without somebody who is a statistician and with a computer handy.

Mr. WESTPHAL. The administrative office compiles what is known as visiting judge tables, you are familiar with those, are you not?

Judge HUFSTEDLER. Yes, indeed.

Mr. WESTPHAL. They show both the number of days of an assignment to your court, the number of sittings that judge participated in and a sitting, of course, is one case that he hears, so that if on a given day a panel heard three cases each judge on that panel would have three sittings to his credit. Is that not true?

Judge HUFSTEDLER. No; sittings are the days upon which the person sits on a particular panel, and the number of cases we calendar per day varies a great deal. We set very heavily our criminal calendars because by and large those cases do not involve as difficult sets of legal questions as the civil cases do. That does not mean they are less important, but the questions are less difficult. So we will sometimes set 10 or 14 cases before a single panel on a single day on the criminal side, for example.

Mr. WESTPHAL. All right. In any event, there are tables that are available prepared by the administrative office that will show how much judicial effort in the way of days and or sittings, whatever the sitting factor really means, there are tables from which this matter of equivalent judgeships can be computed. Is it not a safe estimate to say that the number of equivalent judgeships that you obtain out of all these visiting judge services which you receive will be the equivalent of anywhere from three to six additional judges in your circuit?

Judge HUFSTEDLER. I will have to say I can not deny it, neither can I affirm it, because I simply do not have enough information before me to make that estimate.

It sounds to me that that figure is certainly in the ballpark. But, again, it is very difficult for me to agree across the board, because there are variables in addition to simply the bare statistics of how many judges, which accounts for whether you get more or less from a visiting judge rather than an active judge.

Mr. WESTPHAL. Judge, whatever the actual figure is in the way of equivalent judgeships, and it will be something between an additional three or an additional six, whatever the figures show, the fact of the matter is that with a bench strength of somewhere between 16 and 19 judges, the ninth circuit has still been unable to cope with this huge caseload that has been thrust upon your circuit. Is that not true?

Judge HUFSTEDLER. Well, it is true that we cannot cope with the caseload we have now with the sporadic kind of help that we have. If you are asking me could we handle the caseload we have now if we had 20 judges, I say I think we can, and if I am wrong about that, S. 729 is also wrong about that.

Mr. WESTPHAL. Because S. 729 proposes to create in the circuit only 20 judges.

Judge HUFSTEDLER. That is true, so if it is my problem it is S. 729's problem as well.

Mr. WESTPHAL. We have received testimony in the course of the hearings on this problem indicating that with the exception of the last fiscal year, that is, 1974, in which the ninth circuit had five en banc hearings, that in the 3 years prior to that there had been only one, a total of one in 3 years in the ninth circuit.

Judge HUFSTEDLER. I think your figures are inaccurate, Mr. Westphal. That is not correct. We have had really a great many in the last 2 years.

Moreover, that does not show in the record as well, we have steadily a flow of en banc votes within the court. Some of these are lost by narrow margins and those who dissent from taking a case en banc have expressed their views in dissent.

Mr. WESTPHAL. What I was referring to, you are saying that in 1974 and 1975 you have held a number of en banc hearings.

Judge HUFSTEDLER. That is correct.

Mr. WESTPHAL. What I am saying is that in 1973—1972 and 1971 I think the records compiled by the administrative office showed that your court only had one.

Judge HUFSTEDLER. That is also correct, and I think that all of us realize that we had a far greater responsibility to maintain the law of the circuit, which burden we finally undertook within the last 2 years.

Mr. WESTPHAL. And the testimony the committee has received and this has been received from many of the lawyers in the ninth circuit, to the effect that there were too many conflicts either direct or so-called sideswipes within the ninth circuit, which the circuit sitting en banc was not resolving, and that there was a great deal of uncertainty about what was the law of the circuit in the ninth circuit on a particular question. You have heard complaints of that kind from lawyers, have you not?

Judge HUFSTEDLER. I think the complaint has foundation, Mr. Westphal, and I think that, again, that is one of the reasons why the use of the modified en banc, which is suggested in S. 729, is a very good idea.

Mr. WESTPHAL. All right. But the problem, then, with the subcommittee is that here are these complaints from lawyers in the ninth circuit about the lack of en bancs, which they feel creates uncertainty as to what is the law of the circuit, and the committee has to give consideration to that and at the same time to be thought you expressed this morning, or at least your fear, that under the proposal set forth in S. 729 there would also be some uncertainty as to what would be the law of the circuit. So it is a matter of balancing one type of uncertainty against the other type.

Judge HUFSTEDLER. I think it is a different dimensional problem, if I may say so, Mr. Westphal.

In short, here is another example of how the bill makes problems without solving anything. If we are having difficulty with en bancs now, if we are dealing with a situation in which we do not have conflict-generating mechanism of the kind created by the divisional circuit, certainly we end up having a great many more of those problems. We have not simply one en banc mechanism, we have three.

Mr. WESTPHAL. The committee has also received testimony indicating that part of the reason that the ninth circuit has not held more en banc hearings is the fact that your 13 judges are scattered over nine States that extend, as someone has said from virtually the Sea of Japan on the west to the Missouri River on the east and from Alaska to the Mexican border, and that the difficulty of getting 13 judges together in any one place from that vast geographical area has been a contributing factor to shortcomings of the existing en banc practices in the ninth circuit. Do you concede that is a contributing factor in the problem?

Judge HUFSTEDLER. No.

We have our court meetings early every month and all the judges of the circuit attend unless they are on vacation or excused.

We do not have that kind of trouble getting our judges together, but to the extent there is any such problem it does not go away for example by splitting San Francisco from Los Angeles. Moreover, it does not go away in any event because the judges who choose to maintain their residences at distances very substantially away from Los Angeles and San Francisco, if those judges choose to maintain their residences, for example one in Hawaii and two in the Pacific Northwest, will have to travel in any event, whether the circuit is divided or not.

Mr. WESTPHAL. Are you aware of an order or a decision of the court that someone called our attention to, which in effect, says that the petition for an en banc hearing was denied because it would be logistically impossible to convene the court?

Judge HUFSTEDLER. I am unaware of that decision and if it were made I disagree with it profoundly, because as I say, we get together every single solitary month without any great difficulty.

We have had a problem, it is true, in finding acceptable dates to have en banc hearings by reason of two practical difficulties. One is the need, in order to make the case en banc, to remove all other cases from the calendar that day and relieve the judges of responsibility for having the normal number of sittings every month, and because en banc hearings will only practically be held as long as they require a full judge complement in San Francisco, because we do not have the physical facilities in Los Angeles to seat all those judges.

Mr. WESTPHAL. Now, as I would understand your testimony, you like that feature of S. 729 which could create an additional seven judgeships in the ninth circuit.

Judge HUFSTEDLER. Indeed, I do.

Mr. WESTPHAL. And you like that feature of S. 729 which would create a joint en banc panel as a mechanism for resolving conflicts insofar as California litigation is concerned?

Judge HUFSTEDLER. On that later point, I think I have been inarticulate, like the bill, in terms of having nine members of an undivided circuit to resolve intracircuit conflicts.

Mr. WESTPHAL. Your suggestion is that rather than have the creation of two divisions within the ninth circuit you would like to see the ninth circuit left as it is today with an increase in the number of judges from 13 to 20, and a provision that any litigant who feels adversely affected by the decision of a three-judge panel could then petition the 9—most senior members of that court for en banc consideration?

Judge HUFSTEDLER. Well, I would have a footnote that there is no reason to encourage en banc hearings simply because a disappointed litigant thinks the panel decision is wrong. But I know they will do that.

But of course the en banc mechanism primarily should be a device by which we keep the circuit law in order.

Mr. WESTPHAL. I should have modified my question by saying that a party who feels adversely affected by the decision of a three-judge panel can within the framework of rule 35 suggest to the court the propriety of an en banc consideration of that problem?

Judge HUFSTEDLER. Yes.

Mr. WESTPHAL. All right.

Judge HUFSTEDLER. And of course, I add, Mr. Westphal, and I am sure you intended to say so parenthetically, that any judge, as is true in the court at the present time, can ask for an en banc vote sua sponte, and that would be true with the diminished size of the en banc mechanism here proposed, that is any active judge could request an en banc vote but the vote itself would be confined to the nine-member panel of the court.

Mr. WESTPHAL. So that as I would understand the so-called perfecting amendment which you have suggested to the subcommittee, that given a court of 20 judges you would have an en banc function performed by 9 of those 20 judges?

Judge HUFSTEDLER. Correct.

Mr. WESTPHAL. And that the en banc panel would consider not only cases involving a conflict affecting California litigants, but cases arising from any of the judicial districts within the ninth circuit and having been decided by any of your three-judge panels where the case involves either a conflict or is of sufficient importance that it should be passed upon by the court sitting en banc?

Judge HUFSTEDLER. That is true.

Mr. WESTPHAL. All right. Are you at all troubled by the fact that in that kind of a setup, 11 judges of the court would have no voice in determining the law of the circuit which may be set by a decision of the 9-judge en banc court, and yet each of those 11 judges would be bound by principles of stare decisis to follow that decision in which they have no voice?

Judge HUFSTEDLER. Well, Mr. Westphal, I have two responses to that.

First: If that is a problem it is a problem that adheres in the present draft bill.

Second: I do not think it is a very big problem. The reason is, as I earlier mentioned, we already have an obligation within the circuit to follow prior law of the circuit, whether we agree with it or we do not. The only potentiality being to ask for an en banc hearing by the whole court.

The number of those en banc hearings which individual judges have requested, and have been denied that hearing, is very substantial, far and away the great majority of cases in which a judge asks to have the matter heard en banc which he does not agree with the decisions by another panel are rejected.

We all live with that all the time. He has, nevertheless, got to follow the law of the prior case even if he was turned down. The only possibility he or she has for expressing a contrary view is to file an opinion dissenting from the request for the en banc hearing, and that in and of itself is relatively rare.

Mr. WESTPHAL. You suggest that the problem that I point out, which is a majority of the members of the court being bound by a decision arrived at by a minority of the court would be the same under the provisions of S. 729?

Judge HUFSTEDLER. Yes.

Mr. WESTPHAL. I would call to your attention that under S. 729 judges in the northern division, when they considered that case en

banc each of the nine would have had some input into the decision that that division arrived at in that particular case. Also, if that decision conflicts with one from the southern division each of the 11 judges there would have had some voice into the decision which that court arrived at. So that in the procedure we set up under S. 729 each of the 20 judges at sometime gets some measure of input into the development of the legal issue and its ultimate resolution, and only in the event that there is a conflict between them would the 9 pass upon it on the joint en banc panel. Do you not recognize that is a difference between the procedure set forth in this bill and the procedure which you suggest to the committee?

Judge HUFSTEDLER. I think not, in the first instance suppose, to take a hypothetical case, 10 judges from the northern—I am not using hypothetical figures—but as opposed to 9 judges in the northern division all agree the case should go one way on that issue, and the 9 from the south have exactly the opposite view, and they have decided that at the division level individually en banc. They must, nevertheless, yield to whatever the decision is that is reached by the majority of the en banc panel. They will not be any happier or unhappier by reason of having decided it once.

To the extent they have input, they have input to the suggestion that I have already discussed, and that is any active judge on the court can request the en banc even though he does not vote on the en banc. If he feels particularly put out by the result he can always be permitted to file an opinion dissenting from the en banc panel decision to take the case.

Mr. WESTPHAL. Continuing along on this analysis of what difference there may or may not be between the en banc procedure which you suggest and that which was called for in this bill, under the procedure which you suggest, you would have the en banc panel consist of the nine most senior judges?

Judge HUFSTEDLER. Yes, unless the chief judge were eligible to retire in which event he would not be on the en banc panel anyway.

Mr. WESTPHAL. I understand that qualification also.

But your proposal is that among the 8 members, other than the chief judge, that 1 of those judges, by some system that could be devised, would be rotated off the en banc panel and his place would be filled by 1 of the other 11 judges who had more than 2 years' service on the court.

Judge HUFSTEDLER. Yes.

Mr. WESTPHAL. Now, in the period of 5½ years these other 11 judges would each get their turn to sit on the joint en banc panel under your system?

Judge HUFSTEDLER. That is correct.

Mr. WESTPHAL. Is your proposal to rotate 1 of the judges designed to overcome this possible objection that the 11 might have to the extent that they do not have any voice in determining the law of the circuit?

Judge HUFSTEDLER. Well, to the extent that there is substance to the assumed complaint, it would certainly go a substantial distance in alleviating that situation.

Mr. WESTPHAL. Is that the reason why you have suggested it to the committee?

Judge HUFSTEDLER. I have suggested it for two reasons. First, I believe there should be not only a high degree of stability in the en banc panel, but there also should be injection of some degree of fresh blood on a regular basis and also to give a greater amount of participation for the various members of the court.

But it is also to provide new blood that is not necessarily supplied on a sufficiently regular basis by virtue of retirements.

Mr. WESTPHAL. So that under your system you could have a decision setting the law of the circuit made by the nine-judge en banc panel in a 5-4 decision?

Judge HUFSTEDLER. That is right.

Mr. WESTPHAL. And the following month one of those five would be rotated off and his place would be filled by some fresh blood, and if in a companion case an identical question were raised you would then face the possibility that your joint en banc panel by a different 5-to-4 vote could reverse the prior decision?

Judge HUFSTEDLER. I could say it is possible. It is extremely unlikely, but after all, it is only a difference in degree and not in kind. In the present situation in which we have an en banc split 7-6, the six are obliged to follow the law made by the seven even though they do not agree.

Mr. WESTPHAL. But this likelihood that by rotating, either through your system or through a system where the 9 most senior members could be changed by 1 judge retiring or reaching retirement age and his place being taken by another judge from the circuit, under either of those systems there is a possibility when the en banc is limited to only 9 of the 20 of having the law of the circuit either be determined by a very small majority of the 20 judges or being subject to being reversed once you shift the 5 to 4 from one side of the question to the other?

Judge HUFSTEDLER. Well, that is true, but it is true right now by virtue of a senior status or vacancies which result in a change.

Mr. WESTPHAL. The other thing that enters into this, and it is somewhat related to this: in your testimony you suggest that the division system will produce a great deal of conflict and seem to suggest that the 9 judges in the north will arrive at an opposite legal conclusion on the same issue under the same facts as will the 11 judges from the south. But again, this, like my suggestion that the five to four would shift here to there, presupposes that judges serving on a court of appeals of the United States gets so polarized on legal issues that the second court, to pass upon a question, will willy-nilly say: "We would rather do it our way and we will not give any persuasive effect whatsoever to the decision of our brethren from the southern division who happened to pass in this question in the first place." In other words, what I am suggesting, Judge, is that in the instance where you have a legal issue which affects activities within the State of California that in actual practice there will not be a sort of a willy-nilly desire to create conflicts by deciding this case adversely to a reasoned opinion from the other division.

Judge HUFSTEDLER. Well, I certainly would agree with you that we do not decide cases willy-nilly and we would not under any system.

But, there is a great deal of difference in the obligation to follow the law of the circuit not as a matter of stare decisis, but to follow the law and to look to another opinion for whatever may be their persuasive effect.

Moreover, when we talk about what affects California, I revert to my earlier thought. The problem is that in dealing with the immense variety of Federal statutes, constitutional issues and the like, those are problems that do not just affect California. It does not matter how we decide in San Francisco or Los Angeles, they affect the whole circuit, as well as California. These are matters which judges have reasonable differences of view.

Indeed, in many instances on the difficult questions our court can already split five ways and they are not going to become more agreeable with one another simply because there is a division line placed between them. They are not fungible and they will agree to disagree a good deal, but the occasion for disagreement is substantially exacerbated when you relieve the judges of the obligations to follow the other decisions in other divisions. When you pull that stop, then you have created a situation in which a conflict will be endemic.

Mr. WESTPHAL. My time has expired, but thank you.

STATEMENT OF WARREN CHRISTOPHER, PRESIDENT OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Mr. CHRISTOPHER. Mr. Chairman, before you close the record could I be heard for just a second or two for the purpose of filing a statement?

Senator BURDICK. Well, you are a noted jurist, lawyer, former Assistant Attorney General. The Senate has ordered us to quit. What shall we do about it?

Mr. CHRISTOPHER. I understand. I am fully sympathetic to that and intend to comply, Mr. Chairman. I simply wondered if I could file my statement with the committee because I am obligated to go back to California.

Senator BURDICK. Your full statement will be filed.

Mr. CHRISTOPHER. I am Warren Christopher, president of the Los Angeles Bar Association. I will file the statement I intended to make this morning.

[The material referred to follows:]

PREPARED STATEMENT OF WARREN CHRISTOPHER, PRESIDENT OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: May I begin by expressing my appreciation for this opportunity to appear before this Subcommittee and to present my views on the pending legislation, S. 729, which would reorganize the Fifth and Ninth Judicial Circuits. My comments today are directed primarily at issues that involve the Ninth Circuit and more particularly with regard to the State of California.

This statement will outline some very serious problems with S. 729 as it is currently drafted, but I would emphasize at the outset that the Subcommittee and its staff merit high praise and our deep appreciation for their constructive efforts to address the problems arising from a virtually geometric increase in cases filed in the Ninth Circuit over the last decade. The Board of Trustees of our Association has adopted a resolution opposing the current

version of the legislation for the Ninth Circuit, and endorsing an increase in the number of judges to 20, with an en banc powers to be exercised by a panel of seven or nine circuit judges (copy attached). Our differences with the present bill, however, do not detract in any way from our sense of respect and gratitude for the expert work of the Subcommittee and its staff on an exceedingly difficult problem of judicial administration.

To conserve your time, I will go directly to problems and disadvantages which I perceive in S. 729.

1. *The "joint en banc panel" is an awkward device which would create many more problems than it would resolve.* It is important to recognize that S. 729 would create four layers of decision making for each case brought within the Ninth Circuit: (1) the District Court; (2) a panel of three circuit judges in a division; (3) an en banc panel consisting of all judges of the for certiorari in the Supreme Court, and they would tend to aggravate rather than diminish the caseload of the Supreme Court, and (4) a joint en banc panel drawn from the two divisions. These four layers would precede the filing of an appeal or petition than diminish the caseload of the Supreme Court. In short, one could wonder how we will avoid drowning in our own complexity.

Confusion and uncertainty will abound from this four layered cake. Judge Hufstедler has analyzed in some detail before this Subcommittee the perplexing and often unanswerable questions that will arise from the proposal, and I will not repeat the analysis. It is important to emphasize, however, the fundamental flaw in the assumption of the bill that the unique problems pertaining to California can be solved by placing the judicial machinery of our state in a walled off water-tight compartment. S. 729 makes this assumption by providing that the only decisional conflicts within the jurisdiction of the joint en banc panel are those affecting "personal or property rights" in California (§ 1291(b)).

Quite the contrary is true. California citizens are today deeply affected by decisions originating from almost every state in either of the proposed divisions. For example, a Southern California litigant may be as much aggrieved by an appellate decision on a federal question in an Arizona case as he would be if the case came from Los Angeles. Yet, under S. 729 the Arizona litigant apparently would not have access to the joint en banc panel to seek resolution of a conflict between the decision in his case and a decision in the Northern Division. Thus a high potential exists that one rule might apply in Northern California in direct conflict with a rule pertaining to the exact same issue in Southern California.

In this situation, the Southern California litigant would, of course, have no standing to seek joint en banc review in the Arizona case. Moreover, a Southern California litigant commencing a new case in the same issue would probably find the Arizona case controlling against him in the first two of the four layers (district court and three judge panel). Finally, it might also be a barrier to his obtaining an en banc hearing in the Southern Division. Thus, in trying to remedy the split of California into different divisions, the en banc mechanism of S. 729 applies a cumbersome bandage that does not even cover the wound.

2. *The four decisional layers within the circuit will cause an increase in the delay and expense involved for California litigants.* Under the structure envisaged by S. 729, there will be enormous pressure on California litigants to seek a hearing before the joint en banc panel. However, the delay and expense involved will by no means be limited to the extra time and expense of one en banc panel—though that might be sufficient detriment without more. Rather, the California litigants might be impelled to seek an en banc hearing within their division in order to preserve their application for a joint en banc hearing.

Thus, in comparison to litigants who usually reach the Supreme Court after two hearings or decisions (one by the District Court and one by the Court of Appeals' regular panel!), under S. 729 it is likely that four would be required. No one can be sure how long these four separate decision-making bodies might take, but it will inevitably entail a long and expensive process. Three judge panels in the Ninth Circuit now frequently take well over a year between the filing of a Notice of Appeal and decision. For example, in 1973, it took an average of 428 days from the filing of a Notice of Appeal until a decision was rendered in cases decided after oral argument or submission of briefs, and in

cases disposed of with a signed opinion, the average was 528 days. Moreover, historically it has taken a long time for en banc panels to assemble and decide the cases they hear, and there is no reason to think that separate hearings involving, first, the nine or eleven judge divisions en banc and, second, the nine judge joint en banc panel can be expected to act more swiftly. Indeed, greater delay is likely.

In summary, the four layer mechanism will make it difficult and perhaps unlikely for a case to be ready for the appeal or petition to the Supreme Court *until five years* after it is filed. As most practicing lawyers will attest, this delay can have a critical impact on the settlement posture of litigants and the very quality of federal adjudication. Thus, S. 729 runs directly counter to the urgent need to streamline and expedite federal litigation, which has become increasingly complex.

3. *The serious dangers of a divided California remain under the provisions of S. 729.* The earlier proposal of the Commission on Revision of the Federal Court Appellate System which would have divided the Ninth Circuit into two new circuits—and would have divided the State of California in the process—engendered strong opposition in California and elsewhere. While the Subcommittee's "two-division" approach is a well-intentioned effort to minimize the problems of a divided California, the solution does not come to grips with the fundamental problems.

Under S. 729, California would be united for purposes of appellate review in form only. In practical terms, it makes little difference whether California is split between two circuits (as it was under the earlier proposal of S. 2990) or between two divisions (as under S. 729), because the defects of the old proposal persist.

For example, one of the most serious problems created by a divided California is the potential for inconsistent judgments in cases involving the same parties and same issues but brought in different parts of the state. In California there are a tremendous number of statewide businesses, and many disputes are brought within the jurisdiction of District Courts in both the Northern and Southern part of the State. Inconsistent judgments in two branches of litigation could put a litigant in the intolerable situation in which he might not be able to avoid disobedience of one court.

Perhaps more serious than the possibility of inconsistent judgments is the problem of conflicts as to the legal rules applicable in a given situation. In California were bifurcated, there is a high risk that the Northern Division would interpret California or federal law in one way, while the Southern Division would interpret it in an opposite or significantly different way. This would lead to uncertainty, unequal treatment, and an unattractive inducement to forum shopping. The possibility of Supreme Court review in any case is highly uncertain in view of its own burdened docket.

In addition, if the two divisions in California should interpret state or federal law in different ways, there is the unpleasant prospect that California citizens would be held to markedly different standards of conduct simply by virtue of where their cases were brought or where they happened to be living or travelling in the state. It is hard to believe that the architects of our federal system intended that citizens of the same state should be governed in such a fortuitous and haphazard manner, and this seems particularly true in our highly mobile and interdependent society.

At the risk of some repetition I would summarize and re-emphasize that the joint en banc panel simply does not provide a satisfactory solution to the numerous problems created by a bifurcated California. As pointed out earlier, the mechanism is awkward and slow. At best, it would leave California citizens subject to the risk of inconsistent judgments and conflicts of interpretation of state and federal law for many years while cases move up and down through four layers of decision making. Moreover, there is no assurance that the joint en banc panel will agree to hear and resolve cases presenting these problems. Finally, as spelled out above, S. 729 does not permit a joint en banc review of a decision from a non-California district even though it may be in conflict with a decision of one of the California divisions and even though it may have the most serious ramifications for Californians.

Without going into great detail, it probably bears mention that there have been many efforts to split California for one purpose or another. Suffice it to say here that such efforts are as old as the State itself, going back to the

time of Admission in 1850 when it was proposed that California be divided between slave and free territory. Only a decade ago there was talk of a division of California in the wake of the reapportionment decisions by the Supreme Court. All of these attempts to split California, I am happy to say, have failed.

Against this background, bifurcation would pose a more fundamental danger over and above these problems we have been discussing. It would breed a sense of separation in our state, exactly contrary to the direction in which we should be moving. After having resisted political division of the state for more than a century, it would seem most unfortunate to take a backward step in the judicial field.

4. *In spite of my grave doubts about the workability of the changes proposed by S. 729, I would also underscore two of the aspects of the proposal that have high promise.* First, it is unquestionably necessary to increase the number of judges in the circuit. It is time to end the very heavy reliance on visiting judges and district court judges to handle the work of the Ninth Circuit, with the inevitable delays and inefficiencies of that approach.

Second, there is much merit in the concept of a seven or nine member en banc panel to resolve conflicts among the panels of the circuit. The method of selection of the en banc panel is a thorny question. Personally, I would prefer random selection, with judges serving three year terms, and two or three going off each year, but this is only a suggested approach and it needs a good deal of study and careful thought.

Again, Mr. Chairman, may I express my appreciation for the opportunity to appear. We shall look forward to the further recommendations of the Subcommittee on the underlying problems of the appellate process as well as further consideration of the circuit realignment question.

LOS ANGELES COUNTY BAR ASSOCIATION

RESOLUTION

(Board of Trustees, Adopted January 8, 1975)

Whereas, United States Senate Bill, S. 2990 (committee print dated December 2, 1974) and an accompanying draft report of the United States Senate Committee on the Judiciary have been examined by the Federal Courts and Practices Committee of the Los Angeles County Bar Association, and the Committee having reported thereon with its recommendations; and

Whereas, the Board of Trustees of the Los Angeles County Bar Association, a voluntary bar association of 11,500 members, has considered the report and recommendations, and after full debate, the Board resolves as follows:

1. The Association opposes the basic proposal in said Bill to divide the Ninth Circuit into two divisions, which would split the State of California.

2. The concept that the en banc powers of the court be exercised by a panel of less than the whole number of circuit judges is a workable and useful concept.

3. This Association endorses the proposal of the Board of Governors of the State Bar of California that a simpler Bill be drafted to accomplish the following:

(a) Increase the number of circuit judges as proposed in the existing Bill;

(b) Provide for a selected or designated "en banc panel" of less than all the circuit judges, such as 7 or 9 circuit judges, to exercise all the en banc powers of the circuit;

(c) Select or designate the circuit judges to serve on the "en banc panel" in some appropriate manner.

Senator BURDICK. We might send you some interrogatories.

Mr. CHRISTOPHER. I will be very glad to respond and I will be here all day in case the decision is reversed.

Senator BURDICK. The committee stands in recess until the further call of the Chair.

[Whereupon the subcommittee recessed at 11:20 a.m.]

CIRCUIT REALIGNMENT

TUESDAY, MAY 20, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 457, Russell Senate Office Building. Senator Quentin N. Burdick (chairman of the subcommittee), presiding.

Present: Senator Burdick (presiding).

Also Present: William P. Westphal, chief counsel; William J. Weller, deputy counsel; and Kathryn M. Coulter, chief clerk.

Senator BURDICK. The subcommittee has scheduled today's and tomorrow's hearings to replace 2 days of hearings which we were forced to suspend and cancel last March 19 and 20.

In these 2 days of hearings, we will receive the testimony or prepared statements from witnesses and organizations who are interested in S. 729, and in the printed amendment to S. 729, offered by Senators Tunney and Cranston.

S. 729 represents a subcommittee modification to the recommendation of the Commission on Revision of the Federal Court Appellate System to the effect that the ninth circuit be divided so as to create a new and separate Twelfth circuit. The subcommittee modification would create within the ninth circuit two divisions.

The southern division would consist of the States of Arizona and Nevada, and the central and southern judicial districts of California.

The northern division would consist of the eastern and northern districts of California, Hawaii, and all other unnamed States in the ninth circuit.

The subcommittee modification resulted primarily from the fact that in hearings held last September and October, witnesses from the State of California objected to the Revision Commission's plan which would place part of the judicial business of the courts of California into each of two separate and distinct circuits.

As a result, the subcommittee modification creates separate divisions within the ninth circuit, and provides that any conflict between those two divisions with respect to the validity construction or application of any State or Federal statute affecting rights of litigants in California, would be resolved by a joint en banc panel consisting of the four most senior judges in point of service from each of the divisions, plus the senior chief judge of the two divisions.

On March 17, my colleagues, Senators Tunney and Cranston, introduced Printed Amendment No. 132, which would amend S. 729.

The basic thrust of the printed amendment, which I believe was suggested by the California State Bar Association, is to leave the ninth circuit intact from a geographic standpoint, to increase the number of judges from 13 to 20, and to provide that the en banc function for the entire circuit be handled by nine of the 20 judges.

Thus, the basic question would appear to be one of choosing between the suggestion of the printed amendment that Congress authorize a 20-judge circuit or as suggested by the Revision Commission that Congress authorize a large circuit of that size to function in two separate divisions, consisting of 9 and 11 judges respectively.

It seems to me that the basis for a choice must rest upon which alternative is most calculated to improve judicial efficiency and to promote administration of justice.

I think it would be well to point out what the Revision Commission has to say about the possibility of simply adding more judges to the ninth circuit without making some change in the structure of the circuit.

In its report of December 1973, the Commission stated:

At the Commission's hearings, held in four cities of the ninth circuit the vast majority of the witnesses recognized that some change in the structure of the circuit is necessary.

It was also generally recognized that the problems faced by the court could not be adequately resolved by simply increasing the number of judges. Adding judges without more is no solution. The fifth circuit judges, having lived with a court of 15, have repeatedly gone on record as opposing any increase beyond that number.

Indeed, a majority of the active judges of the fifth find 15 too many. Some of the ninth circuit judges, too, have pointed to the difficulties encountered by their own court of 13, in maintaining institutional unity.

Indeed, in more ways than one, the ninth circuit is close on the heels of the fifth, where a majority of judges, despite their remarkable efforts to cope with a burgeoning caseload and a vast geographical area, have requested immediate relief. It should not be necessary for the ninth circuit to relieve the history of the fifth circuit before its problems of caseload and geographical size are ameliorated.

I should also point out at this time that in October of 1971, the Federal Judicial Center submitted a questionnaire to all Federal judges in the United States. A total of 241 judges responded to the questionnaire.

Of special concern to us is the response of these Federal judges to the following two questions: "Assuming a circuit reorganization is undertaken, what, in your opinion, should be the optimum number of judges per circuit court?" And, "Since it will be difficult to create the required number of circuits so that each one has precisely the optimum number of judges, what should be the maximum and minimum number of judges per circuit court?"

Responses to these questions as to what is the optimum number of judges for an appellate court indicated a clear majority felt that a nine-judge court was preferred. When the response of only appellate judges was considered, almost two-thirds felt that nine was the preferred number of judges.

However, in response to the second question as to what is the maximum court size, the Federal Judicial Center reported responses as follows:

While 41 percent favored nine as the maximum court size, sizable number of judges felt that a court could contain 11, 12, or even 15 judges, and still

function. It is perhaps significant that no judge thought that a court of more than 15 judges would be acceptable. On the other side of the coin, many judges felt that five was the minimum size for an appellate court. However, a significant number of judges suggested three, six, and seven, as the minimum size of a court.

In our prior hearing on March 19, we received the testimony of Mr. Thomas Nelson, president of the Idaho Bar Association, of Judge Shirley Hufstedler and of Mr. Warren Christopher, president of the Los Angeles County Bar Association. We have additional witnesses scheduled today and tomorrow.

Before calling our first witness, let me state that at the conclusion of today's hearing record, we will incorporate into the record copies of correspondence from the following individuals and organizations: A letter from Mr. Earl Hill, advising that the State Bar of Nevada supports the proposal to divide the ninth circuit into two parts and stating that a majority of the lawyers would favor Nevada being aligned with southern California.

A letter from Mr. Dick Wong, advising that the Hawaii State Bar Association supports S. 729;

A letter from Mr. Douglas Drysdale, advising that the Montana State Bar Association supports the proposal to divide the ninth circuit, and advising that Montana desires to remain attached to that part of the ninth circuit which would sit in San Francisco, Portland, and Seattle;

A letter from Mr. John Holloway, advising that the board of governors of the Oregon State Bar Association, by resolution, supports legislation to split the ninth circuit as recommended by the Revision Commission;

A letter from Mr. Eugene Thomas, of the Idaho State Bar Association, supporting the provisions embodied in S. 729, and recognizing that the possibility of a so-called "northwest circuit" must await future events; and, a letter from Mr. Edward Friar, advising that the Washington State Bar Association favors the creation of a northwest circuit, and opposes any division which would include the State of Washington with any part of California.

Because one of our witnesses today is Chief Judge Richard H. Chambers, of the ninth circuit, and because Judge Chambers urged us to consider the views of all 13 of the judges in his circuit, we will include in the hearing record correspondence from the following judges of the ninth circuit: Judge Herbert Choy; Judge Eugene Wright; Judge James Browning; Judge Alfred Goodwin; Judge John Kilkenny; and Judge Ozell Trask. While the majority of these judges support S. 729, the letters they have written will speak for themselves.

Also, I will include in the record a copy of a letter from Judge Russell Smith to Senator Mansfield, advising that the Montana district court judges support S. 729.

I will also include a letter from Chief Judge Harry Phillips of the sixth circuit and a letter from Professor Noel Keyes of Pepperdine University School of Law. There will also be included letters, dated February 14 and April 25, 1975, together with a prepared statement of Honorable Evelle Younger, the attorney general of California, who advised me that his office was unable to have a witness to attend our hearing today.

(The letters referred to are printed at the end of this day of hearings.)

I understand that my colleague, Senator Tunney of California, desires to submit a written statement because his commitments in connection with other hearings prevent his attendance here today.

(The prepared statement of Senator Tunney follows:)

PREPARED STATEMENT OF SENATOR JOHN V. TUNNEY

Mr. Chairman: Thank you for this opportunity to comment on S. 729, a bill to revise the Ninth and Fifth Circuits. I am pleased that this Subcommittee has undertaken the difficult task of providing relief for these two beleaguered circuits; such reform has long been needed. As a Senator from California, I am particularly concerned with those aspects of the bill dealing with the Ninth Circuit. Although its case load has increased substantially in recent years, the number of judges on the Circuit has not increased since 1968, so that by 1973 the court had a backload of 170 cases per judge. To deal with this situation, the court has had to make more use of district court judges and retired members on its three-person panels, but even these measures have not alleviated the problem. It is obvious that Congress should provide a remedy.

Unfortunately, I do not feel that the solutions offered by this bill are viable. S. 729 proposes an increase in the number of judges for the Ninth Circuit from 13 to 20 together with the creation of two "divisions" of the circuit of nearly equal coseload and population. This numerically balanced revision would cut California into halves, placing the northern part of the State in one division and the southern part in another. I fear that such a division would place intolerable burdens on California State government officials and litigants concerned with California law issues who would have to deal with both divisions of the Circuit between which there might be conflicts of interpretation. Moreover, this novel approach to judicial reform might cause more delays in the handling of complete cases and would certainly contribute further intricacies to an already complicated Federal appellate system.

In an effort to avoid these problems, Senator Cranston and I have introduced an amendment to S. 729, co-sponsored by Senator Laxalt of Nevada, which would increase the number of judgeships from 13 to 20, but which would keep the circuit and California intact. I, therefore, welcome this chance to explain both my objections to S. 729 and the reasons for my amendment.

S. 729 is a product of the Commission on Revision of the Federal Court Appellate System. The Commission Report suggested that the 9th Circuit be split into two separate circuits, and, because California contributes about 70 percent of the cases now handled by the Circuit, that the State be divided between the two new circuits. At the Hearings on this proposal, representatives from the California State Bar Association, local bars, and California State government pointed out that such a division of the state could create serious conflicts between the two new Circuits, each of which would be interpreting California law.

In response to these criticisms of the Commission's plans, S. 729 no longer envisions the creation of two separate circuits, but proposes splitting the Ninth Circuit into Northern and Southern divisions, with the State of California again divided in half. The bill would also establish a new judicial entity, entitled a "joint *en banc* panel." This panel would preside over both divisions of the circuit to resolve conflicts in cases arising from California. I appreciate the fact that the Subcommittee has drafted a bill designed to overcome the objections made to the Commission's original suggestion. By providing for the creation of a "joint *en banc* panel," it has acknowledged that the division of a state between two circuits or two divisions of the same circuit can create special jurisdictional and substantive legal problems. I am pleased that these problems have been recognized.

However, S. 729 redefines the word "circuit" in other statutes and provisions of the law so that each "division" is actually a judicial circuit with the power to sit *en banc*. Thus the same problems that would occur with two circuits interpreting California law will occur between two separate divisions of the

Ninth Circuit interpreting the same law. Conflicting judgments or orders between the two divisions arising from California cases remain a problem. Moreover, a statewide California agency under S. 729 might still be faced with the dilemma of following inconsistent rulings in the northern and southern parts of the state.

Nor are these objections to the division of the Ninth Circuit and California academic or limited to unusual situations. In his prepared statement to this Subcommittee on March 20, California State Attorney General Evelle J. Younger listed six areas in the field of criminal law alone where such conflicts could easily occur. In cases of statewide impact, such as those arising out of California's billion dollar water project which runs the length of the state, conflicting decisions are a very real possibility; challenges in Federal court are likely to be brought against such a project or state agency actions from both the north and south parts of the state, which, under S. 729, would place these cases in different divisions of the circuit. It is clear, then, that the bill invites forum shopping and conflicting interpretations. Indeed, it is because such conflicts will occur that the Subcommittee has provided for the creation of a "joint *en banc* panel" in S. 729.

Since most of the cases presently handled by the Ninth Circuit come from California, this special panel will probably have a heavy caseload. Yet, it may not be equal to its task. *En banc* panels are now rarely held in all the circuits because of the difficulty in getting a large number of judges together at one time. This is particularly true in the geographically large Ninth Circuit which held no *en banc* hearings in Fiscal Year 1971 or Fiscal Year 1972. Because of a similar difficulty in getting together the nine judges from both divisions who are to comprise this "joint *en banc* panel," there may well be a tendency for it to meet occasionally to resolve only the most obvious cases of conflict between the two divisions. Cases in which a potential conflict may exist or which are not seen to be of the utmost importance may not be heard by this "joint *en banc* panel." Yet, the failure to resolve such cases may create uncertainties in the law which will make planning difficult in both the public and private sectors. Even in cases which are scheduled to be heard, going through an additional tier of appeal will add to the delay of resolving them.

This joint *en banc* panel is also objectionable as a reform measure because it will add to the costs of litigating cases concerned with California law and will be a substantial burden to the Federal bar in California. Lawyers in my State who litigate in Federal Court will have to follow cases in both divisions and will be penalized by the added costs and delays if they unfortunately have to appeal a case on the grounds that a conflict exists between the divisions. This burden will be particularly great for the California State government which will have to monitor decisions in both divisions and appeal any conflicts which exist to insure that state agencies can apply uniform procedures and orders throughout the entire State.

The jurisdiction of this special panel may also be too circumscribed for it to deal with all the potential or actual conflicts that may exist between the divisions in the interpretation of California law. As Warren Christopher, President of the Los Angeles County Bar Association, pointed out in his testimony before this Subcommittee in March, an Arizona litigant will apparently not have standing before this "joint *en banc* panel" to resolve a conflict between his case, which arose in his own state, and a decision in the Northern Division. Thus different orders or rules of law could apply in the northern and southern parts of California which could not be resolved except by an appeal to the Supreme Court.

Because of the complexities, uncertainties and problems presented by S. 729, Senators Cranston, Laxalt and I have offered an amendment which would not alter the proposed increase in the number of judges in the Ninth Circuit from 13 to 20 but would keep the circuit and California intact. I believe that we are all in agreement that these additional judges are needed to help the court reduce its current backlog of cases. As S. 729 recognizes, though, a method must be found to provide for the manageability of such a large circuit: 20 judges would rarely be able to sit *en banc*. Therefore, this amendment authorizes the use of an "*en banc* panel" of nine judges selected by seniority or by any other method chosen by the Circuit. While it may be preferable, as the Commission Report found, to have circuits of nine members

each, in the Ninth Circuit this is not possible without the division of the State of California, which presents problems that outweigh the advantages of the 9 judge model.

Mr. Chairman, there has been some criticism of our amendment to the effect that limiting the *en banc* function in all cases to nine judges is not conducive to harmony in a court containing more than nine, and would have the effect of creating "first- and second-class" circuits judges. Such a division of authority, though, is found in every judicial system and in every form of governmental and private organization. Moreover, this same criticism can be made against S. 729 is creation of a special "joint *en banc* panel," for it too would be comprised of nine judges who would decide certain cases for all the circuit's 20 members. In short, I believe that nine circuit judges selected by an appropriate procedure similar to that proposed for the "joint *en banc* panel" is S. 729 would be a suitable tribunal to make and settle the law of the circuit. With such a review jurisdiction explicitly provided by statute, I do not believe that there would be any "disharmony" in the circuit.

Moreover, this amendment provides a method for insuring the managability of a 20 judge circuit without requiring any changes in the procedural or structural characteristics of the court. It requires neither drastic changes in court procedure nor the creation of new rules to be added to the sufficiently complicated nature of Federal appellate procedure. It is also consistent with the fourth criterion listed in the Commission report for the successful revision of the circuits which states that excessive changes from present patterns are undesirable. By providing for a nine-judge *en banc* panel, this amendment creates no other changes in current circuit practice—unlike S. 729 which would have to be implemented with many new rules and procedures.

In sum, this amendment represents a simpler method to revise the Ninth Circuit which will create fewer problems and avoid unnecessary changes. It accomplishes everything that S. 729 does in a more direct fashion and should not be thought of as a "stop gap" measure. Both our amendment and S. 729 increase the number of judges on the Circuit from 13 to 20; our amendment however, accomplishes this without dividing the Circuit and the State of California or creating a cumbersome additional level of appeal. The amendment has the support of the California State Bar Association and the California State Attorney General. Judge Shirley Hufstедler, a distinguished member of the Ninth Circuit, also supports the basic ideas embodied in the amendment. The Los Angeles Times, The Sacramento Bee and Riverside Press Enterprise have written editorials in support of the amendment, and have expressed their dismay at the possible adverse consequences of S. 729.

In light of this support and the problems which the bifurcation of California would create, I respectfully submit that the subcommittee consider favorably the amendment which Senators Cranston, Laxalt and I have offered. In the interests of simplicity, continuity and uniformity of decision within the Ninth Circuit, I believe that it should be adopted.

I would like to submit the editorials I have mentioned as attachments to this statement.

[From the Riverside Press Enterprise, March 21, 1975]

ONE APPELLATE COURTS INDIVISIBLE

A bill before the U.S. Senate would split California into two federal appellate court jurisdictions, which might not sound especially unworkable, but would probably produce confusion in determining the applicability of appeals court rulings.

The Ninth District Court of Appeals comprises the nine western states, including California. It has, as courts everywhere do, a growing caseload. More judges are needed, and a bill introduced by Sen. Quentin Burdick, D-N.D., would increase the number of Ninth District justices from 13 to 20.

Good enough. But the Burdick bill would also split the Ninth District into two subdivisions, one of which would include Northern California and the other of which would get Southern California. That is better, but not by much, than the recommendation of a federal commission in 1973, that the Ninth ought to be split, not into two subdivisions, but into two distinct appellate court districts, again, with part of California in each.

The problem posed by any such division of the state is that appellate court decisions are applicable only within the area of their jurisdiction, and it is

not hard to conjure a situation in which the controlling appellate court rulings on a particular issue would differ from Northern California to Southern California, and perhaps differ diametrically.

California's two Democratic senators, Alan Cranston and John Tunney, plan to introduce an amendment to the Burdick bill which would drop the subdivision proposal and substitute a special panel of nine justices to expedite appeals. That seems the better way, because where possible the federal courts (and federal jurisdictions of all kinds) ought to observe local and state government boundaries.

[From the Los Angeles Times, May 6, 1975]

THE BURDEN IN THE 9TH CIRCUIT

Federal appellate courts are burdened by an oppressive workload. The litigation is heavy in the huge 9th Circuit, which extends from the Arctic Circle to the Mexican border and from Montana to Guam. Roughly two-thirds of the workload of the U.S. Court of Appeals for the 9th Circuit is generated in California. Something should be done.

But legislation pending in Congress that would split the circuit into two divisions, with Northern California and Northwestern states in one division and Southern California and Southwestern states in the other, is certainly not the answer.

It would, as Judge Shirley Hufstedler of the 9th Circuit told a Senate judiciary subcommittee, create "a jurisdictional and procedural morass." The measure, said Warren Christopher, president of the Los Angeles County Bar Assn., runs directly counter to the urgent need to expedite and streamline federal litigation. And California Atty. Gen. Evelle J. Younger told the same subcommittee that there could be confusion and delay in obtaining clear and final decisions affecting state law and state programs.

Their concerns are thoroughly justified. The northern division of the court might interpret state or federal law in one way while the southern division might interpret it in an exactly opposite manner. The potential conflict is great. It embraces—to name but a few subjects—water law, welfare rights, public housing, educational aid, revenue sharing and the administration of criminal laws.

Hufstedler gave the committee a partial list of systemic and dollar costs that circuit splitting would engineer. It included increased appellate and district court litigation, further delay of decisions on pending appeals, escalated costs to litigants and increased burdens on the U.S. Supreme Court.

The solution lies, we think, in scrapping the two-division concept, increasing the 13-judge court to 20 members and providing a more expeditious procedure for the relatively infrequent en banc decisions that are necessary in cases of overriding importance or far-reaching effect.

Present law requires the participation of all 13 judges for en banc decisions. Sens. John V. Tunney and Alan Cranston of California plan to offer an amendment that would eliminate the two-division proviso and permit en banc decisions by 9 judges, rather than the hoped-for-20. The amendment has been drawn with the assistance of the State Bar of California. Although Hufstedler, Younger and Christopher have differing views as to how the en banc panel should be constituted, they all support the basic idea. We urge its adoption by Congress.

[From the Sacramento Bee, April 28, 1975]

THE HALVING OF CALIFORNIA

We are disturbed by proposals to divide California into two distinct legal sectors as the way to relieve the logjam of cases before the 9th Circuit Court of Appeals.

There is no denying arguments put forth by the Chief Justice of the United States, that federal appellate courts generally face an oppressive workload.

The 11 courts he spoke of experienced a 5 per cent increase in new cases filed last year, for an all-time high of 16,436. To get by, Burger said, they had to "resort to some draconian measures," such as curtailing oral arguments. The number of authorized circuit judges (97) has remained constant since 1968.

The 9th Circuit Court, in our own baliwick, is among those with a heavy backlog and it has a special problem in its far-reaching jurisdiction. But we

find no redeeming excuse for the severe surgery advocated in and out of Congress.

The 13-judge court covers an area stretching from the Arctic Circle to the Mexican border, from Montana to Guam. Its nine western states include California, the most populous in the nation.

A plan conceived by a special commission last year called for cutting the 9th Circuit in half—and in the process establishing two separate systems of federal law in California.

Lawyers protested the plan would lead to an intolerable situation if, as sometimes happens between various federal appellate courts, the northern and southern California courts disagreed on an all-California problem.

One example cited is not academic. It deals with current litigation over the California Water Project, which extends almost the entire length of the state. With two circuits, it is possible they would wind up issuing conflicting orders on water contracts—and then what? Stand in line before the U.S. Supreme Court?

The conflicts could affect prisons, welfare departments, cities trying to enforce statewide statutes and even private business—banks, especially. The state attorney general's office says the problems would be "horrendous."

Sen. Quentin Burdick, D-N.D., who failed to get the divided court bill through last year, has introduced a revised version which would create a special nine-judge panel to resolve conflicts between the two divisions of what would become a 20-judge 9th Circuit. The new approach makes the plan only slightly less objectionable.

It seems reasonable to expect that legal and academic circles can offer a solution without going to the extreme of partitioning California. Such a stringent step is totally unacceptable.

Senator BURDICK. Our first witness will be the Honorable Robert Duncan, the Congressman from Oregon.

Welcome to the committee, Congressman.

STATEMENT OF HON. ROBERT DUNCAN, A REPRESENTATIVE IN CONGRESS FROM THE THIRD CONGRESSIONAL DISTRICT OF THE STATE OF OREGON

MR. DUNCAN. Senator, it is very kind of you to have me. I come here as a Member of Congress, and as one who practiced law for a number of years in the State of Oregon. I do not come before you as a regular practitioner in the court of appeals. I come as one of the great number of Oregon lawyers, some of whom practice in the small towns, some in Portland, who from time to time come into contact with the Federal courts.

I might say the office I was with in Portland had a great volume of work in the Federal court, although I participated only spasmodically. I wrote a letter earlier this year to the committee, which I would like included in the record. I addressed myself to the problem of congestion in the ninth circuit.

Senator BURDICK. Without objection, that will be included.

[The letter referred to follows:]

MARCH 7, 1975.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: As one recently returned from the practice of law in Portland, Oregon, after eight years of absence from the Congress, I want to add my support to the efforts to solve the congestion and delay in the Ninth Circuit calendar. My last case ran 22 months from the final brief to notifica-

tion of argument and in that case the respondent had not even made an appearance.

While I individually lean toward a split of the Circuit, the consensus is apparently in favor of some additional judges and the retention of a single Circuit with two divisions. The mechanics are of less importance than is the solution of the problem.

I know there are many other important matters before your committee, but I hope you will be able to reach this matter within a reasonable time.

Sincerely,

ROBERT B. DUNCAN,
Member of Congress.

Mr. DUNCAN. I, individually, lean toward the creation of two circuits, but I understand the problems that are involved with respect to the origin of most of the cases, the difficulty of splitting the State of California, and I consider a solution to the problem of congestion to be much more important than the details thereof, and therefore without qualification, I would support the effort of this committee in the bill to create two divisions in the ninth circuit, to add some additional manpower, again, in an effort to solve this problem.

I appeared in front of the ninth circuit on several occasions when I practiced in Medford. Medford is a long way from the seat of the U.S. district court. At that time, most of the lawyers were literally terrified of the chief judge of that district, and our personal preferences were to take our cases into the Oregon courts, where we were familiar with the procedure and where we were in much less trepidation of the chief judge.

From time to time, however, we did go into Federal court. The more we went in the better we liked it.

On the rare occasions when I had an appeal in those days, I recall the time for its resolution was long but at that time also the time for resolution of cases in the State of Oregon was long, and so it did not appear to be particularly a problem.

The last case I took to the ninth circuit, Senator, was not a very complicated case. It was one in which rough justice had been accomplished in the District, but my client felt that his pleas had not been sufficiently considered. So we took an appeal from that case.

Now, on the day before we took the appeal, the respondent's attorney resigned. There was no further substitution of attorneys. Our briefs were filed. There was never any appearance on the part of the respondent.

As I recall now, it took approximately 22 months from the time that our last brief was filed until we were notified that the case was ripe, and had been set down for an original hearing.

Now, I do not blame all of these problems on the judges. I know that there are problems that are created by the lawyers themselves. I assume this committee is addressing itself to all of the problems of delay in the courts, and coming from Oregon where our trial courts will get to a case in 6 to 9 months, and where the appeals are handled with equal expedition, we have difficulty in understanding why the Federal appellate system should be so far behind.

As a matter of fact, if the chief judge who is in the chambers now will forgive me, I do not think I will ever forget in this particular appeal when the district court's opinion did not seem to be amply explanatory of the thought processes, he leaned over the bench and

said, Mr. Duncan, what would you think if we sent this case back, if we remanded it for additional explanation to the trial court's opinion?

And as a lawyer anxious to get an affirmative decision, I hesitated to respond quite as freely as I wanted to, and I finally decided I would anyway, and I said, your Honor, do you really want to know what I think, and he said yes; and I said, well, I do not think very much of it. I said I am from Oregon, and I said our courts are fairly current, and I said I have had a difficult enough time trying to explain to my client why we have had to spend 22 months getting this case to oral argument, during which period of time for all we know the respondent's assets have been dissipated, and our ability to collect on any judgments which might be entered accordingly impaired.

But I said I do not think it would be possible for me to explain a further delay, why this case went back on a remand, and fortunately the court decided the case promptly.

Now, as I say, Oregon, I think, has set a pretty good example to the rest of the States. We introduced an intermediate appellate court. We give that court the ability to make memorandum decisions. We give that court the power to actually make a decision on the bench, at the conclusion of oral arguments, and it has cut the backlog of cases down appreciably without any particular resentment, I think, on the part of either the litigants or the attorneys.

I would like to suggest also that we can, as a member of a legislative body, help the courts in cutting down the volume of cases. There are two situations that occur to me immediately.

One of them is on the question of victimless crimes, and having scanned through the chief judge's testimony, I note that he refers to that, too, and Oregon again took the lead with respect to victimless crime, particularly the crime of possession of marijuana. It now makes it a civil offense with a penalty, I think, of \$100 to be caught in possession of one ounce or less of marijuana.

Now, I have introduced a similar bill into the Congress of the United States. I have reserved judgment with respect to the abolition or the treatment similarly of sales not for profit, because I do not think we ought to do anything to encourage the use of marijuana any more than I think we ought to encourage the use of alcohol, but our experience in Oregon thus far has been that the volume of cases has been cut down and we think there has been no appreciable increase in the use.

I would like to direct your attention to one more area where I think the Congress could help the courts with their appeals, and that is on the question of environmental law. It seems to me that Congress has imposed upon the courts a task for which they have really no particular expertise, and in many instances the decisions, the final decisions as to where bridges or highways are to be built, which logging areas are to be logged, and a whole panoply of environmental decisions are now being thrown into the hands of the courts, and they are lawyers and have no particular expertise in this field.

I think the great strides forward that we have made in the field of environmental law must be retained, and I have tried to search for a solution. I have introduced no legislation but I am thinking along the terms of perhaps an administrative court with an appeal

to the judiciary only on questions of constitutionality, or on questions of arbitrary and unreasonable action by the administrative agency that made the decision, or by the administrative courts that affirmed it, or changed it.

That is about all I can say. I endorse the proposal to split the circuit. I think that with your joint en banc hearings that you retain the concept which is undesirable of a, I suppose, a first and second class judge on the courts but I foresee that no solution that we reach is going to be completely satisfactory.

In my opinion, it is more important that we take a step forward, that we make a decision, than it is that that decision be in all respects absolutely the perfect decision, and I thank you, Senator, for letting me appear before you.

Senator BURDICK. I thank you for your contribution this morning.

Mr. DUNCAN. Thank you, sir.

Senator BURDICK. Judge Richard H. Chambers, chief judge of the ninth circuit. Welcome to the committee again, judge.

STATEMENT OF RICHARD H. CHAMBERS, CHIEF JUDGE OF THE NINTH CIRCUIT, SAN FRANCISCO, CALIF.

Judge CHAMBERS. Thank you.

I am Richard H. Chambers, chief judge of the ninth circuit.

I am sure he does not object to my saying so but Mr. Duncan assured me, as he went out the door, that it was someone else on our court that they had been scared of, and so far as I know, I had not been aware of anyone in Oregon being afraid of the current chief judge.

Mr. Chairman, I noted that you did not list any communication from the Arizona State Bar, to go into the record. I thought I forwarded the latest position on the stand of the State Bar to Mr. Westphal.

Mr. WESTPHAL. I do not recall it, judge. My recollection is that the last time we talked, you said that at a meeting in May, the Arizona State Bar had authorized you to—in your appearance here today—speak on their behalf also.

Now, if I have overlooked a piece of correspondence, of course, we will correct it.

You might summarize the position of the State Bar.

Judge CHAMBERS. Well, it does exist. It is not something that is going to be gotten up posthearing.

Senator BURDICK. When the statement arrives, it will be made a part of the record.

Judge CHAMBERS. Very well, if that may go in.

[Letter from Arizona State Bar:]

STATE BAR OF ARIZONA,
OFFICE OF THE PRESIDENT,
Phoenix, Ariz., April 15, 1975.

Re Proposed Reorganization of Ninth Circuit.

HON. RICHARD H. CHAMBERS,
U.S. Court of Appeals,
Tucson, Ariz.

DEAR JUDGE CHAMBERS: At the meeting of April 11-12 the Board of Governors again discussed the proposed reorganization of the Ninth Circuit.

At that time I recommended that the Board take action in accord with my letter of March 27, a copy of which was forwarded to you.

The Board instructed me to request that when you appear before the Senate Committee considering the matter, you indicate to them that you are authorized to express the views of the State Bar of Arizona. The position of the State Bar of Arizona is as follows:

1. The best and most feasible solution to the problem is simply the appointment of enough additional judges to handle the work of the Ninth Circuit. The State Bar does not feel that there is an insurmountable administrative problem which would render this solution unacceptable.

2. If, however, the Committee feels that the administrative problems involved in simply appointing more judges would be too great, the only rational alternative acceptable to the State Bar of Arizona would be dividing the Circuit into a northern and southern division and appointing sufficient additional personnel to handle the case load. This, of course, would require some en banc procedure. The Board of Governors takes no position on what type en banc procedure would be best, since it feels you are much more knowledgeable about that than we are. However, in the event northern and southern divisions are established in the Ninth Circuit, the Board of Governors feels that Arizona should be part of the southern division, but provisions should be made for transfer or assignment of trial judges from either division to the other, as the need arises.

The Board does not consider that any of the other alternatives so far mentioned are viable. In the event neither of the suggestions mentioned above can be implemented we would appreciate your letting us know as soon as possible; we can then take a position on whatever other alternatives may then be proposed.

I am sending a copy of this letter to Judge Hufstедler to inform her that the Board has decided to request that you speak for the State Bar of Arizona and to thank her for her past efforts on our behalf. I am not sure that formal notice to the Committee is necessary since you were already scheduled to appear at the hearing. However, if formal notice is required, I would appreciate your informing the Committee that you speak for the State Bar of Arizona; if you prefer, please let me know and I will send them that notice.

Best personal regards.

Yours very truly,

STANLEY G. FELDMAN.

Judge CHAMBERS. The Arizona State Bar, which authorized me to present their position, I would say has first, last, and always been, and predictably, opposed to any proposition to annex Arizona to the tenth circuit.

Now, this is not because of any dislike of Arizonans or Coloradans or New Mexicans. But it is based on a number of things. I think you can find the key to it in this.

Our airlines will sell 10 times as many tickets from Arizona to California as they will sell from Arizona to Colorado. And the one ticket sold to Colorado, it is probably an even chance that someone is going out there hunting or fishing, or a student involved, or some family business.

But the only legal contact between Arizona and Colorado is that some of our municipal bonds in Arizona are marketed through Denver houses, Denver bond houses.

I practiced law 19 years, less the war years, and I never had occasion to go to Colorado on legal business. I had two occasions to go to Lordsburg, N.M., on a State court matter, just over the Arizona line, but after a few years I was going on business for clients several times a year to California.

Then, also, you see, while Oregon is not a community property State, virtually all of our States are community property States.

The great majority of states in the tenth circuit are not community property States. I believe Senator Fannin advised you of the position of the State Senate.

Now, what is the rest of the Arizona State Bar's position? First, as I understand it, they are willing to go along with the—with what have been characterized as the Tunney-Cranston amendments. They are willing to go along with that. Also, they are willing to go along, if the committee finds that infeasible, with S. 729, the two divisions, and I would say that they join me in my unhappiness about any proposed northwest division.

That solves nothing. I am sure, if we are all perfectly honest about it, that the northwest division, the way you read your statistics, has only 17 percent of the load.

If you are an enthusiast for it, you can figure around and come up with about 19 percent. But either way you cut it, its present load is a workload for 31½ judges, and that solves nothing.

The only reason, and I mean no offense when I say this, the only reason to create the Northwest circuit, that I can see, is just to be doing something, and, of course, I have a unique point of view from which to observe it. I say to you that this mobility of district judges that we have in the ninth circuit is the most wonderful aspect that any circuit has, and their availability to be moved around out of the Northwest where they have the time to do their work properly, and with some dispatch, is largely because they have few border problems.

If that mobility is destroyed, I just will be sick about it. In San Diego, where they have five Federal judges, by division of labor it takes 41½ judges down there to handle marijuana and heroin, speed and cocaine, amphetamine cases.

We have transferred down here from the east a security and exchange case that will take 3 months to try. We cannot spring a man for it.

All right. I call up Judge McNichols in Idaho. We have got this situation in San Diego. I cannot spring any man along the coast, or out of Arizona, can you take it? Well, he says, I do not want it, but I am part of the ninth circuit, and I will do it.

I can give you a dozen of those types of cases that the judges of the Northwest have taken on in the last 6 or 7 years.

So, let me give you the picture on our court, on the state of our business. Now, around 1966, Congress simultaneously passed the Bail Reform Act and the Criminal Justice Act, which gives every indigent or semi-indigent a free lawyer.

You cannot tell, the two of them being simultaneous, which brought us the most criminal business. I think actually the two of them put together resulted in giving us more than the sum total of the two if they had passed separately.

Anyway, the largest part of this criminal business we have is Southern California, Central California, Los Angeles, and Arizona.

Now, in California criminal appeals run about 11 months from sentence to issue. Now, that is in the State courts. Now, that does not result in as bad a situation as that much delay on the Federal side, because on the State side, the bail is not as freely given as on the Federal side.

Well, what does that mean? That means that you do not have the embarrassment of recidivism when the man is in the penitentiary or jail that you have with the Federal prisoner, if he is out a similar length of time, bringing in marijuana or heroin once or twice.

Well, what I am coming to is to this. With the permission of the court, I set out about 3 years ago to get our time on the criminal appeals down, and we have brought it down from approximately 9 months to a little over 5 months and we are going to get it below that.

Now, that has delayed the civil calendar, by my expediting of these criminal appeals. I do not expect to get it down much more than 1 more month—so that setback has been absorbed. The administrative office, I am sure, supplied the figures. But we are now taking in about 3,000 cases per year.

In the last 3 years we managed to dispose of the number of cases which we took in the year before. This year, indications are that filings have leveled off.

Well, what are we behind? We are behind approximately 650 cases.

Now, bear in mind, we take in over 3,000. And in those 600 cases, there are something like 138 environmental cases that have the same issue, and which by either formal stipulation, or by consent of the parties expressed by letters, been put on the back burner with the representation that they expect to be settled.

So I consider that we only have 400 cases, civil, waiting to be heard.

Now, you get into this problem. There must be a dozen types of cases by statute that are given priority and, for instance, by statute labor board cases are to have priority. Those are civil. Environmental cases, priority. Recalcitrant witnesses, priority. Some social security matters, priority. As a matter of fact, the priorities overlap, so we treat all the priorities essentially as equals.

Also we grant motions to expedite civil cases. An observation on that. I live in Tucson part of the year, have had informal, friendly relations with members of the local bar. They ask me when a civil case could be heard and I say, is there any reason it should be heard right away? Oh, yes, yes. Well, I tell them, make a motion to expedite it. That happens once a month, I suppose, and still in the last 4 or 5 years only one Tucson lawyer has made a motion to expedite.

In other words, if we had had the 15 judges the same as the fifth circuit, those two men would have made the difference between no backlog and what I consider that comparatively small backlog of 400 cases. Just two judges would have made the difference.

I thoroughly agree that, in the ideal, nine judges is big enough. I do say, though, that we bring in district judges for only short times because if we bring them in for a full week that breaks their stride at home.

A court of 20 circuit judges would be easier to handle assuming you have a limited number, less than all, to hold the en bancs. It would be easier to handle than bringing in 35 district judges for short periods. And so I do say this. If it is the wisdom of the committee to go the California way, then I think we can handle it. However, the en banc should be less than all and I think that the judicial council should be less than all.

I doubt that even 13 circuit judges should be assembled to pass judgment on the requests for 300 more square feet for the bankruptcy judge at Modesto, Calif. But I feel this. In my judgment with a court of 13 we have had less conflict between the panels than when I joined the court as a court of nine. The reason we had less conflict with 13 than 9, which on its face seems improbable, is a different set of judges, a younger set who are probably more flexible. I do have this terrible concern about the Revision Commission's hard line across California, complete surgery, almost complete surgery, two circuits, about the California plan and about S. 729 as written.

In 1959 the Congress passed a bill to provide that the chief judge should be the senior in service, under 70. Now, gentlemen, I appeared before the Revision Commission in open hearings here the other day. I went away particularly saddened that the oldest member of the Commission, a former Congressman, thought that I was making an attack on people over 70 years of age. Nothing could be further from the truth. I think it is better that people over 70 be relieved of the administrative duties, generally so. What is unique almost in the Federal judiciary, you can always find something dignified and honorable for a retired judge to do, even though he does not have the physical strength to handle large or heavy cases, and those retired men are the jewels in our crown. We have 13 or 14 of them in our district.

Every one of the district judges eligible to retire has retired with two exceptions. One has been eligible for 2 weeks and the other one who is still only 67 or 68, has been eligible for 2 years. No reason why they should retire at all except to give us another new judge.

I apprehend that unless your bill, whichever alternative it adopts—if you do not exclude those who are eligible to retire from the limited en banc court, you are going to be right back where we were one the ninth circuit when I joined the court in 1954, with judges of the average age about 70 years. Because those people that are on the en banc will feel it their duty to stay on and supervise their younger brothers and keep their thinking straight. As a matter of fact, some of that impetus is kind of surging in me now, that I might have a duty to stay on and help them with their thinking if I had some special position. That would be tragic, of course.

If you will bear with me, the legend is, and I am sure it is true, that the reason we got this statute about under 70 years of age, was that newly appointed, newly confirmed Chief Justice Earl Warren went up to a judges' dinner, a bar meeting, in Manhattan and an 87- or 88-year-old chief judge of the district was seated next to the new Chief Justice and the new Chief Justice said, I am Earl Warren and the chief judge of the district said I am so and so. What did you say your name was? I believe that history to be correct.—

This graduated step retirement should also be enacted.—It really would be tragic if we about-face and discourage our men from retirement.

Let me say that no living human being has expressed a contrary opinion to this one that the less-than-all en banc court should be constituted by judges ineligible to retire, and no one has expressed any opposition whatever to this graduated retirement.

We can live with the California plan. We can live with S. 729 quite peacefully. For my own part, because of the loss of the northern blood bank, the outright split of the ninth circuit would be something very undersirable, terribly undesirable from the standpoint of getting our work done in the southern part of the circuit.

As a matter of fact, diversity litigation is such a small part of it that I am not troubled in that field about northern California and southern California going two ways. I have some trouble in this perennial business that we are into now which is not a matter of our creation, regulating State agencies. I recall one case we had involving welfare where we ordered Governor Reagan to find \$200 or \$300 million right now. I cannot help but wonder about the race to the courthouse that we might have had on that thing.

I fear I have not been very helpful and, of course, it is not my circuit. It belongs to the people, the lawyers, and I may not attribute anything. Anyway, I hope you will pardon me for saying that if the Congress decides to cut off my right arm, I want to be around when it is done and I hope you will forgive me for all the time I have taken, Senator.

Senator BURDICK. Thank you very much, Judge. Your testimony has been very helpful.

We just have a few questions. This question of not designating a judge to serve en banc, who is eligible for retirement, I think has a lot of merit and some language we have worked out along those lines reads as follows: "A judge who is eligible to retire under section 371 of this title is disqualified from serving on a joint en banc panel."

Now, the only question I have then is should that apply to the chief judge of each division?

Judge CHAMBERS. As a chief judge eligible to retire, being the one circuit judge eligible to retire who has not done so, my answer is yes. He obviously is not going to be there very long.

Now, I think one associate is good enough to replace the chief judge; but I say by all means count him out of the en banc.

Senator BURDICK. Well, Judge, here is what bothers me. Suppose that both the senior judges in the two divisions are eligible to retire. What do we do about that ninth man? And they are both under 70 and both over 65.

Judge CHAMBERS. I would say that the senior of the two in service would preside, I think so.

Senator BURDICK. Under our format we have a ninth man. If we disqualify the two chief judges I presume we can take the next in line who was not eligible to retire who is senior and have him serve as the ninth man.

Judge CHAMBERS. Yes.

Senator BURDICK. How would that work?

Judge CHAMBERS. It would work. As of the moment I think it is all right.

Senator BURDICK. But the other two would still be chief judges as long as they were there.

Judge CHAMBERS. I beg your pardon?

Senator BURDICK. The chief judges would still be chief judges but they would not be sitting on the en banc panel.

Judge CHAMBERS. Yes, that is right. No chief judge is going to run out of work even though he is not sitting on those en banc panels.

Senator BURDICK. Judge, the attorney general of California, in a prepared statement he has submitted for the record, criticizes S. 729 because a joint en banc panel would not have jurisdiction of a case until an actual conflict exists between the two divisions. Do you think that the joint en banc panel also should have the discretion to accept the case which is of such importance that the issue should be decided by the joint en banc panel at the earliest opportunity?

Judge CHAMBERS. I would not know how to say it just offhand. There ought to be a provision that, oh, where it is public law, at least where public law is involved, that it could promptly go en banc. Now, I am sure that Mr. Westphal could come up with something on that.

Senator BURDICK. Did he give you the language of the proposed amendment?

Judge CHAMBERS. He handed it to me.

Senator BURDICK. See if that would take care of the situation in your opinion.

(Proposed Amendment follows)

PROPOSED AMENDMENT TO JURISDICTION OF JOINT EN BANC PANEL

In line 5, page 23, of the bill after the phrase "have jurisdiction over" insert "(1)."

In line 10, page 23, delete the period and quotation mark after the word "State" and insert the following: "and (2) any deviation, or a panel thereof, involving, as a question of first impression or of primary importance, a determination of the validity, construction, or application of any statute or administrative order, rule or regulation, where it is shown to the joint en banc panel that a prompt review of such decision by the joint en banc panel is necessary to avoid uncertainty and to promote uniform application of the law within a single state or within the several states of such circuit."

Judge CHAMBERS. It seems to me to be very well drawn. I am inclined to think so. And I would say that if you go the California route, something similar should be put in, but it—well, I dare say that somebody might have some little suggestion but as I read it now, I like it. I think it is excellent.

Senator BURDICK. Judge, I think staff has one or two questions for you and that will be it for this morning.

Mr. WESTPHAL. Judge, under date of March 17, you submitted a prepared statement to the subcommittee and I take it that you desire that that statement be included in the hearing record.

Judge CHAMBERS. That is correct.

Senator BURDICK. Without objection, so ordered.

(The prepared statement of Judge Richard H. Chambers follows:)

PREPARED STATEMENT OF RICHARD H. CHAMBERS, CHIEF JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. Chairman and Members of the Subcommittee on Improvements of Judicial Machinery: Perhaps I should first comment on S. 729, 94th Congress, introduced on February 18, 1975.

This bill would create two large divisions of the Ninth Circuit. The Northern Division would be Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Northern California and Eastern California. The Southern Division would consist of Arizona, Nevada, Central California and Southern California.

Speaking as one-thirteenth of the active court, I do not oppose this concept. It is far superior to the proposal to create two circuits with the same geographical boundaries, which was embodied in the Realignment Commission's report of December 18, 1973. It would preserve our blood bank of easily borrowable district judges from the five Northwest states. And, there is no factor more important in this realignment business. As to the Ninth Circuit, I say it is the most important factor.

Our southern districts are always short on judges. I anticipate it will continue. Practically, we cannot pick up the telephone, dial Congress and get another judge for a district. Practically, we have to wait until the wagon comes by. Sometimes we have to wait as long as seven years to get an authorization for more judges. This is not likely to change.

So what do we do meanwhile? We make do with what we have. There are always in our southern districts some that are in trouble. Today it is Arizona. A few years ago, it was the Southern District of California at San Diego. Earlier it was Los Angeles. Always our Court of Appeals needs help. Where do we get it? We get it mostly out of the Northwest and from a few senior judges from outside the circuit. The chief judge has the responsibility of shifting these judges around. I appeal and I beg the Congress not to leave the southern districts to just stew in their own juice.

As to details of the intra-court reorganization, I would ask leave of the committee to permit the judges of the Ninth Circuit to submit written suggestions on the subject—if the committee decides the basic idea of S. 729 is what it wants.

There is one thing in S. 729 that alarms me and will continue to do so unless changed. It provides for an en banc panel of less than all circuit judges. It envisions the more senior active judges to sit. This en banc panel ought to be composed of judges not eligible to retire. If it is not so composed, you will have judges staying on beyond time they would normally take senior status. It is too easy to feel you are needed to straighten out the thinking of your brothers if you have the upper hand. Let the bill stand without a qualification on the age of members of an en banc court of less than all the judges and you will quickly get an over-aged court.

Other points where consideration should be given to modifying S. 729 are minor in comparison.

Other proposals should be discussed. We understand that the California State Bar has come out against S. 729. They, we believe, think the Ninth Circuit is not bad as it is now constituted. They believe in the regional concept (that is, a large region) and there is a lot to be said for it. They would add more circuit judges, but put in a fairly small en banc court of less than all to resolve conflicts between panels. If the California Bar would add the limitation of prohibiting judges eligible to retire from sitting on the limited en banc court, it would be, in my view, quite workable. Of course, if the committee accepts the California Bar's concept, we would like to be consulted as to details.

The Revision Commission wisely rejected the proposal for a Northwest circuit of Alaska, Idaho, Montana, Oregon and Washington. Their load is only about 20 percent of our total. From the standpoint of the Court of Appeals, it just cuts off the dog's tail. From the standpoint of our southern districts with their ever present need to borrow, it chops off the dog's back legs.

Now there is a recent movement to make a circuit out of California and Arizona. This is no better than the Northwest circuit idea. Adding Nevada and Hawaii to the Northwest circuit would leave the Arizona-California circuit with about 75 percent of its present business. This idea of California-Arizona as one circuit would soon shift to making California-Arizona, Hawaii and Nevada (plus Guam) into a circuit, which is now the other side of the Northwest circuit's present coin.

Why would it so shift? Heretofore, there has been in the past an effort to tie Hawaii into a Northwest circuit. Hawaii's ties are to California. I know Nevadans have nothing per se against Oregonians. But they will say, "No, thank you" to being joined to Washington-Oregon.

Will the two states be shuffled into a circuit to which they do not want to belong? Won't their representatives in the Congress be responsive to the wishes of their virtually unanimous views at home? And, will not this committee respect their wishes?

Practically, there are other problems in creating this Northwest circuit. The Bar of Idaho is against it. I have found no sentiment in Montana for it. At best, there is badly divided opinion for it in Alaska, Oregon and Washington.

There the argument for it is "prompt service." Give us some more judges (or take away our marijuana business) and we will give them prompt service. The Northwest is not complaining about conflicts between panels or the luck of the draw.

In fiscal year 1974 we took in 2,316 cases. By source, our circuit executive allots the percentages as follows:

	<i>Percent</i>
Alaska.....	1. 2
Arizona.....	9. 7
California.....	64. 2
Hawaii.....	2. 0
Idaho.....	1. 4
Montana.....	1. 7
Nevada.....	4. 7
Oregon.....	5. 4
Washington.....	8. 1
Guam.....	1. 6
Total.....	100. 0

Thus in fiscal 1974, a circuit of Arizona and California would have produced 73.9% of the business that came in. If Hawaii, Nevada and Guam were added to California, the percentage would have been 82.2%. Thus, the five Northwest states of Alaska, Idaho, Montana, Oregon, and Washington were the source of only 17.8%. Parenthetically it should be noted that the districts of California divided up as follows:

	<i>Percent</i>
Central.....	28. 3
Northern.....	17. 5
Southern.....	14. 4
Eastern.....	4. 0
Total.....	64. 2

There has been a notion that a court of nine should be the optimum. It is a good theory, but right now California alone needs 14 judges. Add Arizona, and 16 are needed. Add Nevada, Hawaii and Guam and 17 are needed. And one needs at most only 4 for the five Northwest states.

Any solution will be imperfect. S. 729 is feasible. The California State Bar's proposals are feasible. Both bills need minor tinkering.

Mr. WESTPHAL. In that statement you furnished to the committee a breakdown of the number of appeals which originate from each of the States in the ninth circuit and your statement indicates that 64.2 percent or 1,487 of those cases come from the State of California.

Now, that statistic alone is the nub of the particular problem that this legislation is directed at is it not?

Judge CHAMBERS. Sure is.

Mr. WESTPHAL. All right. Now, then, you also state that to handle the California caseload of 1,487 cases would require 14 judges just to handle that caseload which originates in California. Do you agree with that?

Judge CHAMBERS. Right.

Mr. WESTPHAL. So that the problem is trying to get the proper number of judges into a court to handle that particular caseload.

Now, if one were to stick to some magic number of judges, and if that magic number of judges should be 14 or 15, that would mean that California would have to be a circuit all by itself, would it not?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Well, then, let me ask you this, Judge—

Judge CHAMBERS. It would be over nine anyway.

Mr. WESTPHAL. Do you favor a concept whereby a Federal Court of Appeals, a circuit court, whether that court should be a one-State court or whether it should be a several-State court?

In other words, do you see any advantages to having that court as sort of a regional court composed of three or more States?

Judge CHAMBERS. There are advantages to a regional court. I do not mean to be smart aleck about it but I have no objection to California being in the circuit as long as I do not have to be part of it. Then there has been talk that the Congress is going to do something. We can count on that.

All right. I agree to that premise. So let us have a circuit consisting of Arizona, California, and Nevada or Hawaii.

Now, that proposal is in my view—there has been also talk of Arizona and California. I cannot believe that this committee or the U.S. Senate are going to kidnap Nevada or Hawaii up with the northwest circuit.

Mr. WESTPHAL. Judge, you put your finger right on the very problem that the Congress and this committee face and that is this, that if you start out with California having 64 percent of the caseload of the ninth circuit and if you start out on the premise advanced by the California Bar Association that in no way should California be split, divided, or otherwise gerrymandered, that then you have the problem of Arizona, as you have stated, wanting to retain judicial ties at the Federal appellate level with California because that is where all its economic and social ties lie. Nevada takes the same position as you have just stated. That is, they want to be tied with California. Las Vegas is very close to Los Angeles and that is where their ties run. Their biggest city is Las Vegas. And their next biggest city, Reno, is closely tied to San Francisco. That is where all their interests run. And the Nevada Bar Association has advised us that because the population, a majority is down in the southern part of the State, it is very likely, on just a simple poll, that Nevada would prefer to retain alinement to the Los Angeles area.

Now, then, you have Hawaii. They do not want to be kidnapped either. They want to retain ties to California, preferably to the San Francisco area, and that is the testimony they have given to the revision commission. That is the thrust of the statements they have submitted to this committee.

Last March the President of the Idaho State Bar Association said that Idaho wanted to retain ties to California because that is where they got their code in the first instance and there is a great comfort for them to be able to rely on judicial interpretations coming out of California State courts as well as Federal courts. So that the problem for the Congress, in that posture of events, is that it is virtually impossible to give to each of those States 100 percent of their desires without having the same situation you have now or without creating the northeast circuit. Is that not true?

Judge CHAMBERS. Well, I think my statement says that in my opinion the division principle that your subcommittee has worked out I think is sound. I also say we could live with the California plan and try it out and if that had the faults that some people

think it will, then you can go to the two divisions, but similarly if you divide the circuit, make two circuits, it is hard to retreat to the two divisions. If you create the two divisions it is hard to retreat to, impossible to retreat to the California plan. Now, what is the bill number?

Mr. WESTPHAL. S. 729.

Judge CHAMBERS. When S. 729 came out I was happy. I thought that somebody did realize that I was not talking through my hat when I talked about the necessity of retaining that northwest blood bank in the district court and the proposition that that district thing is more important than the court of appeals.

Mr. WESTPHAL. All right, Judge. So you recognize that in S. 729, provision is made so that the ninth circuit, composed of two divisions, will still have what you refer to as the blood bank.

Judge CHAMBERS. Yes; and I am very happy with it.

Mr. WESTPHAL. So that satisfies you.

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Also am I correct in recalling that you yourself have been an advocate of having the ninth circuit organized into administrative divisions? I believe this was a suggestion of yours before S. 729 or the revision commission or anything else was ever thought of. Is that not true?

Judge CHAMBERS. Oh, I think that you could say yes. But keep in mind that I would do anything to keep that northeast blood bank.

Mr. WESTPHAL. Under S. 729 you have got your blood bank.

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Now, as far as whether the ninth circuit is organized into these two divisions as provided in S. 729 or it is not, let me ask you this. Under the rules of the ninth circuit as they exist today, do those rules provide that appeals from Arizona and Nevada will normally be heard in Los Angeles unless the court orders otherwise? Is that not true?

Judge CHAMBERS. I would not say that.

Mr. WESTPHAL. Well, let us take a look at the rules.

Just let me find the rule so we can keep the testimony straight on the point that I have raised here. It may not be in your rules. It may be in one of your general orders.

Judge CHAMBERS. I think that is where it is.

Mr. WESTPHAL. Do you recall what general order it is, Judge?

Judge CHAMBERS. No, I do not know the number.

Mr. WESTPHAL. I am starting out with general order No. 2 and there is also general order No. 15 and quite a few general orders.

Judge CHAMBERS. Well—

Mr. WESTPHAL. Well, in any event, you do recall, do you not, that which says that cases being appealed from the district courts of Arizona and of Nevada will normally be scheduled for hearing by the court at Los Angeles. Do you recall that in your general orders?

Judge CHAMBERS. I believe there is something to that effect in the general orders but I am so full of the subject of expediting criminal appeals where I was given almost carte blanche authority that in most of the load out of southern Nevada and Arizona that is criminal, the clerk is now under instructions from me to put those on where

he can get them heard first. And so that is the preponderance of the thing. Normally, Reno civil cases will be heard in San Francisco and I think the clerk has it in his discretion as to whether he puts Arizona on Los Angeles or San Francisco.

Mr. WESTPHAL. All right. And then under the general orders of the court the clerk is also instructed that appeals which originate in Idaho, Montana, Oregon, Washington, Alaska, and Hawaii, will normally be set for hearing in San Francisco unless they are put on the Portland or Seattle calendar or the occasional calendars which you have in Honolulu and/or Alaska, is that not true?

Judge CHAMBERS. Yes, that is right.

Mr. WESTPHAL. All right. So that under the ninth circuit procedures today there is, as a practical matter, a division, a geographic division, of the places where your appeals will be heard and that division is roughly the same as the division suggested by the revision commission and the geographic alignments laid out in S. 729. Is that not true?

Judge CHAMBERS. I think the answer to that is yes.

Mr. WESTPHAL. All right.

Judge CHAMBERS. If you had the people in the Northwest, that southern border of Oregon would be a splendid place to divide it.

Mr. WESTPHAL. Now, in the composition of your panels for sitting, the general orders of your court also have a provision to the effect that if, and I quote now from section 4(e) of general order No. 2 which was revised as of April 1, 1974, under that general order there is a provision that says: "If possible, a rotation system shall be followed so that active judges of the court will sit with every other active and senior judge approximately the same number of times each year."

Now, you recall that part of your general order?

Judge CHAMBERS. Oh, yes.

Mr. WESTPHAL. And the purpose of that, Judge, I assume, is so that your 13 judges have an opportunity to work with each other frequently enough on three-judge panels so that it preserves some sense of institutional unity among your 13 judges, develops a little collegiality and develops a little esprit de corps, that is correct?

Judge CHAMBERS. That is correct.

Mr. WESTPHAL. All right. Now then, if the California plan were accepted, whereby you would have 20 judges under the same geographic setup that exists now in the ninth circuit, it would still be a good policy to do that in order to promote esprit de corps and collegiality in the sense of unity but your problem of arranging that schedule is complicated by the fact that instead of trying to fit 13 judges into relative equality of sitting with their colleagues you then have to work 20 judges into this relative equality of sitting with their colleagues, is that not true?

Judge CHAMBERS. Let me say that it works out very well and as a matter of fact, it could all be done by computer. But I hope to be gone by the time we have a computer arrangement.

Mr. WESTPHAL. Judge, you told us a couple of interesting anecdotes here that you gleaned along the line. I assume you also heard about the anecdote which runs to this effect, that when the fifth circuit reached the number of 15 judges and having a few senior judges also

available from within their own circuit, that in the fifth circuit where they had this same policy of having judges sit in equal number of sittings with each of their colleagues so they could promote collegiality. Judge Brown found it in fact necessary to use a computer in order to solve that problem because the number of different panels you can compose out of 15 or 18 judges is almost infinite and it overwhelms the simple mathematical ability shared by either judges, chief judges, or lawyers. You have heard that anecdote, have you not?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. So is not that going to be part of the problem of trying to run the circuit with 20 judges which is even 5 more than what their experience has been now in the fifth circuit.

Judge CHAMBERS. Well, let me explain first how Judge Hufstedler, who makes them up for us, works. She—well, I guess you would call it country grocery store style. She makes out the panels. But then the clerk is constantly every month, publishing a table for the past 12 months of who sat with whom. As she goes along, she compensates for Judge Kelch sitting too much with Judge Chambers, for Judge Wright not sitting enough with Judge Chambers, and at the end of 12 months, by constantly compensating, it works out.

Mr. WESTPHAL. Before you leave that point, Judge, my point is simply this. The work involved in trying to compensate, as you say, for this inequality that sometimes occurs, it takes much more compensating when you are dealing with a group of 20 judges than it takes if you are dealing with a group of 13 judges, is that not true?

Judge CHAMBERS. Oh, obviously, but it does not take as much as we have got now dealing with 13 active, 4 retired, and 25 district judges.

Mr. WESTPHAL. All right. Now then, let us talk a little bit about that. You make the suggestion that if the ninth circuit had had 15 judges for as long as the fifth circuit had had 15 judges, that the ninth circuit would not have this backlog of 600 civil cases. According to what you told us, according to the records, over the past 4 or 5 or 6 years the ninth circuit has had the equivalent bench strength of approximately 19 or 20 judges through its use of a district judge serving as the third member of each of your three-judge panels.

Now, in 1972, for example, 53 percent of the opinions of your court were written by the active judges of your court, 24 percent were written by the senior judges in your court, and 23 percent were written by either district judges or visiting judges, from within the circuit, or from visiting judges from without the circuit. So in the year 1972, there were some 66 different judges employed in the opinion writing efforts of your court.

The figures for the year 1973 are somewhat comparable except that the effort by seniors went down a little bit and the effort by district judges amounted to 27 percent.

So, as a matter of fact, by this use of district judges, which you were just simply forced to do in order to keep up with your backlog—we understand that—the fact of the matter is that the equivalent judge-power in the Ninth Circuit has been much larger than the number of 13 over the last 5 or 6 years. Is that not true?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. All right. Now then, under either S. 729 or under the California Bar proposal, there would be 20 judges in the Ninth Circuit. Under S. 729 nine of them would be in one division and 11 of them would be in the other division which would be operational entities bridged by the joint en banc panel.

Under the California Bar plan, we would take your court as it now exists and simply increase the number of active judges from 13 to 20.

Now, as I recall your testimony, you said that you could live with that, especially if the less-than-all or the nine judge en banc were written into that proposal. Is that not true?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Are you at all troubled by the fact that under the California Bar proposal 11 of the judges would be excluded from en banc participation, that they would have no input into the en banc function of making the ultimate determination of what is to be a law of the circuit?

Judge CHAMBERS. Not particularly, but, Mr. Westphal, that all comes back to my concern over the tragedy of creating the so-called northwest circuit. Anything is better than that.

Mr. WESTPHAL. There is no proposal at this time, under existing caseloads, for creating a northwest circuit. What the attitude of the members of the bench and the bar and of the Congress would be some years hence when caseload patterns and litigation patterns in the so-called northwest circuit are different than they are now is another question. It is not for us to decide. But the point of it is this:

As the chairman stated in his opening statement, the choice for the committee here and the choice for Congress is one of whether you employ 20 judges in one circuit and the only change you make is to have the less-than-all en banc which is the California Bar proposal, or whether you have those 20 judges organized in the two divisions, one consisting of nine and one consisting of 11.

You have stated that with less than all in the en banc, en banc of nine, that would be feasible. My question to you, judge, is that if those other 11 judges had no input into en banc proceedings, no input into determining the law of the circuit, they are then in a position where they must, on the principle of stare decisis, follow and be bound by the decision made by the nine even though they have had no voice into it.

Now, my question to you is does this not tend to destroy a sense of institutional unity, of collegiality or camaraderie, esprit de corps, all of which are I think you will recognize as vital characteristics of a good efficient appellate court?

Judge CHAMBERS. Well, it sure would if you do not put in the clause about those eligible to retire cannot sit on it.

Mr. WESTPHAL. Well, we can oust the judges who are eligible to retire but have not yet retired. We can bar them from the en banc function. But if there are two of those who have not retired you would still be left with nine judges plus those two that we have excluded because they are eligible for retirement. In either event you have still got 11 judges left who have had no input in determining the law of the circuit, who are nevertheless bound by it, and all I can suggest, judge, is that that is almost self-defeating in a sense in that

we are posing the possibility of those 11 judges feeling that they are not first class judges, that they have no voice in determining the law that they are expected to follow.

Judge CHAMBERS. Mr. Westphal, you have got a good point there. I do not think it is quite that serious and I have the feeling in my bones that if you follow the California plan, it would eventually work out something like S. 729.

Mr. WESTPHAL. Let me expand my point a little bit. Also in your testimony you indicated that if the California plan were going to be followed with a decision to having a less-than-all en banc, you also suggested that the judicial council should consist of less than all. I do not know what your suggestion is as to how many of those 20 judges should assume the responsibilities of carrying out the function of the judicial council of the ninth circuit, but again if it is conceived that only nine of the 20 should carry out the judicial council function, again you would be excluding 11 judges from participation in what I would think is a vital part of running a circuit court. It is not that important as to whether a magistrate or a referee gets \$300 additional salary but there are a lot of things done by a judicial council which are vital to the functioning of that circuit and if we exclude 11 of them from that function as well as excluding 11 of them from an en banc function, I greatly fear that the point is a little bit better, and a little bit more serious, because again we have taken another step towards creating second class judges.

I would suggest that the second class under this scheme, if the nine judges who sit en banc are the same as the nine judges who sit on the judicial council, that then you are going to have 11 judges whose only purpose is to be one of three warm bodies on a panel who have to go through the nitty-gritty of hearing arguments, and writing up cases, and participating in screening. You are inevitably going to have some divisive effect upon this sense of collegiality that each appellate court has.

Do you have any reaction to that?

Judge CHAMBERS. Well, Mr. Westphal, I do not know how it has come about, but we have had so many junky duties imposed on the council that most of us would be glad to be rid of them. For instance, all our senior judges are invited to attend our council meetings. They all reply, what do you think I retired for, and do not come, unless we especially request.

If I may double back just a moment, one thing I did want to get into the record. If we had had 15 judges we would still have used the district judges but we would be up-to-date. Now here is one thing that I can only prove by going back to 1954. At that time the ordinary civil case, no priority, backlog, was about 600 cases when the court was increased from seven to nine. That increase enabled us, with the use of district judges, to get caught up so that when the last brief was in, counsel in civil cases got notice that his argument was immediately set.

Well, when we got caught up, the number of appeals dipped a little and did not increase for 4 or 5 years or 6 years, and what I am saying is that it is hard to prove that delay feeds on.

Mr. WESTPHAL. Judge, please do not misunderstand me. By my questioning I do not imply any criticism whatsoever of the ninth cir-

cuit today or the ninth circuit in the past. I am sure the committee does not intend that. I am sure the Congress does not intend that.

The point of the matter is that almost everybody, yourself, all the judges on your court, virtually all of the lawyers in the ninth circuit who have any Federal practice at all, recognize that despite your best efforts there are problems in not only the ninth circuit but the fifth circuit and Lord knows they have all got them. But the reason I refer back to past records and past experiences is to see whether we can learn from that something that helps the Congress make the decision which it has to make on these competing plans.

Now, just if I might, in order to further delineate what we are talking about here, and set some parameters on what we are talking about, insofar as the concept where less than all of the judges of a court participate in the en banc and the judicial council functions of the court, I would like to call your attention to the fact that under general order 15 in your court, under the revisions dated April 1, 1974, that being the general order which deals with en banc hearings, petitions for rehearing an amendment of opinions, and so forth, that those rules go on at great length in order to make sure that every active judge of the 13 active judges in the ninth circuit today gets a voice into the en banc function of that court.

I would ask, Mr. Chairman, that that general order 15 be included in the record.

Senator BURDICK. Without objection, so ordered.

[The material referred to follows:]

EN BANC HEARINGS; PETITIONS FOR REHEARING; AMENDMENT OF OPINIONS

General Order No. 15 (Rev. 4/1/74)

1. DEFINITIONS

"Hearing" means the initial hearing in this Court, whether by a panel or by the Court en banc.

"Rehearing" means any subsequent hearing by the panel or by the Court en banc, whether or not an opinion has been issued and whether or not the initial hearing was by a panel or by the Court en banc.

"En banc coordinator" is a member of the Court appointed by the Chief Judge, with duties set forth herein.

2 SUGGESTIONS AND REQUESTS FOR INITIAL HEARING EN BANC

(a) *Suggestion by a party.*—Upon receipt of a suggestion of a party for an initial hearing en banc, made pursuant to Rule 35(b), Federal Rules of Appellate Procedure, the members of the Court ordinarily will withhold action thereon unless and until advised by one or more members of the panel on the calendar to which the case is ultimately assigned whether an initial hearing en banc is deemed advisable.

Unless a member of the Court requests en banc consideration, the Clerk shall calendar the case in due course for a panel hearing pursuant to General Order No. 2. When the case is calendared, the Clerk shall call to the attention of all active judges the suggestion for an initial en banc hearing. If, after the judges of the panel have read the briefs in ordinary course, in preparation for oral argument, one or more of them conclude that the suggestion should be adopted, he or they shall so advise the Court as provided in subsection (b) of this section. If no request is received, it will be assumed that no member of the panel believes an initial hearing en banc advisable. Any judge in active service may, without awaiting consideration of the suggestion by the panel, request the en banc coordinator to take a vote thereon.

(b) *Form of request.*—A request by a member of the Court for an initial hearing en banc shall be addressed to all members of the Court in active serv-

ice, with information copies to senior judges, and the en banc coordinator shall call for a vote thereon.

(c) *Removal from calendar*.—If a suggestion or request for initial en banc consideration under subsections (a) or (b) of this section is communicated so near the time of the scheduled hearing that the vote cannot be taken before the time of the scheduled hearing, the Clerk may be requested by the en banc coordinator to remove the case from the calendar of the panel and postpone the scheduled hearing.

3. RESPONSE TO PETITION FOR REHEARING

When a petition for rehearing has been filed the Court, or a panel thereof, shall ordinarily call for a response thereto before granting a petition for rehearing, or amending its opinion, by substitution of opinions or otherwise, in such manner as to affect the result. If the panel grants a panel rehearing on a petition which included a suggestion for rehearing en banc, it shall so advise the other members of the Court.

4. PROPOSAL OF JUDGE THAT PANEL WITHDRAW AND AMEND ITS OPINION OR FILE A SUBSTITUTE OPINION

In lieu of requesting a rehearing en banc as provided in section 5 of this General Order, an active or senior judge of this Court may propose to the panel, with or without copies to the other members of the Court in active service, that the panel withdraw and amend its opinion or file a substitute opinion. Upon receipt of such a proposal either the author of the opinion, if a circuit judge of this Circuit, or the senior member of the Court on the panel if the author of the opinion is not a member of the Court, shall notify the Clerk that a proposal to withdraw the opinion is under consideration and that the mandate should not issue until the Clerk receives further advice from the panel.

If the panel accedes, in substance, to the proposal that the opinion be amended or replaced, it shall proceed accordingly; however, if a petition for rehearing has been filed it shall call for a response before taking the proposed action if the action would affect the result. If the panel declines to accept the proposal, it shall notify the judge who made the proposal and such judge shall have ten days thereafter to request a rehearing en banc, as provided in subsection 5(b).

If the judge making such a proposal expects to be absent from the circuit or otherwise unavailable to act in the matter at the time the panel acts upon the proposal, such judge shall advise the panel. If the panel, following receipt of notice of the judge's absence, determines not to accept the proposal, it shall withhold action to that effect until the judge making the proposal is available, unless urgent circumstances require prompt disposition of the case. Similarly, where a panel has not received notice of the unavailability of a judge making such a proposal, if it has actual knowledge that such judge is unavailable to act in the matter, it shall give consideration to withholding adverse action on the proposal until the judge making the proposal is available.¹

5. INITIATIVE BY JUDGE FOR A REHEARING EN BANC

(a) *Proposal to panel*.—(1) Procedure: A member of the Court, or of the panel to which a case has been assigned, may, on his own motion, propose to a panel the appropriateness of en banc consideration, in which event the judge initiating the proposal shall notify the Clerk and the en banc coordinator that he is making such a proposal. Any such proposal shall be made prior to the expiration of the fourteen-day period allowed for the filing of a petition for rehearing, and shall have the effect of staying the issuance of the mandate until further notice from the Chief Judge or the en banc coordinator.

(2) Action: No action shall be taken upon such a proposal until at least five days after expiration of the time for filing a petition for rehearing. If no petition for rehearing is filed, the panel shall then make its recommendation upon the proposal and follow the same procedures as it would upon a petition of a party for rehearing with a suggestion for en banc consideration; if a petition for rehearing is filed, copies thereof shall be distributed to the members of the Court in active service and to any other judge who may have proposed a rehearing en banc.

¹ The provisions of the above paragraph are effective also as to each section of this General Order wherein they appear applicable.

(b) *Request for vote of the Court.*—A member of the Court may, by following the procedure outlined in section 7 of this General Order, request consideration by the Court of the appropriateness of en banc consideration: (1) on his own motion, provided such request is made within the time period specified in section 5; or (2) in response to a panel recommendation rejecting a suggestion or proposal for panel action to initiate rehearing en banc.

6. PANEL RECOMMENDATION

(a) *For rehearing en banc.*—Should the panel to which a case has been assigned determine, sua sponte or upon consideration of a suggestion of a party or a proposal of a member of the Court or of the panel, that the case should be reheard en banc, it shall follow the procedure outlined in section 7.

(b) *Against rehearing en banc.*—Should the panel to which a case has been assigned determine, upon consideration of a suggestion of a party, or of a proposal of a member of the Court or of the panel, that the case should not be reheard en banc, it shall, without taking any other action, so advise the other associates.

A member of the Court in active service, receiving advice from a panel that it does not favor a rehearing en banc, is not required to take any action thereon, in which event it will be assumed that such judge defers to the view of the panel. Any member of the Court in active service, upon receiving such advice, who desires to request en banc consideration may do so within fourteen days from the date of the advice from the panel by following the procedure outlined in section 7 of this General Order.

If no judge requests or gives notice of intention to request en banc consideration within fourteen days of the panel's advice to associates, the panel may then present to the Clerk for filing its order denying the petition and rejecting the suggestion for rehearing en banc.

7. EN BANC CONSIDERATION BY COURT—PROCEDURE

(a) *Recommendation of panel or request of judge.*—(1) Preliminary notice: If a judge wishes to request en banc consideration and cannot prepare his supporting memorandum within the fourteen-day period following a panel memorandum rejecting en banc consideration, or a panel wishes to avoid delay when preparing a recommendation for en banc consideration, the judge or panel shall circulate to associates and to the Clerk the following preliminary notice of intention to seek en banc consideration:

To All Associates and Clerk: Date: _____

PRELIMINARY NOTICE OF INTENTION TO SEEK EN BANC CONSIDERATION

In

(Name and Number of Case)

(Identification of Panel)

It is (the intention of the panel in the case, my intention) within fourteen days from the above date, to present a (recommendation, request) for en banc consideration in the above entitled case.

Note to Clerk:

Upon receipt of this Notice you will not issue the Court's judgment until notice from the Chief Judge or the en banc coordinator.

(2) Formal request or recommendation: Circulate memorandum, to reach associates within fourteen days after date of panel memorandum rejecting rehearing, or after preliminary notice, if any, stating that the memorandum constitutes a request or recommendation for en banc consideration under General Order No. 15, indicating the reason for the request or recommendation, and specifying the

question or questions with which the court, en banc, will be particularly concerned. If the Clerk has not been notified by copy of a preliminary notice, the requesting judge or the presiding judge on the panel shall request that the mandate be held until further notice from the Chief Judge or the en banc coordinator.

A panel should not ordinarily make a recommendation to take a case en banc unless and until the members of the panel have first expressed their views in the form of a proposed opinion or opinions which can be circulated with the recommendation.

A judge requesting en banc consideration may express his views in his initial memorandum, or in the form of a dissent or a proposed opinion, or may indicate that a memorandum or opinion will follow within a specified time.

(3) Response: If the request challenges a previously published or circulated opinion, the judge making the request shall invite the author of the challenged opinion to respond within fourteen days so that the members of the Court will have the benefit of an appropriate exposition of conflicting views before proceeding further.

(4) Failure to circulate memorandum: If the requesting judge does not follow through with the memorandum contemplated in 7(a)(2) within thirty days from the date of his formal request, the en banc coordinator shall inquire of the requesting judge concerning his wishes, and if the requesting judge does not desire to circulate a memorandum the en banc coordinator shall place the matter upon the agenda of the Court and Council for resolution at the next available meeting.

(b) *Action upon recommendation or request.*—(1) Time for response: Any member of the Court or panel shall have fourteen days in which to circulate a memorandum in response or to notify the associates of an intent to circulate such a memorandum.

(2) Initiation of voting procedure: Not less than fourteen days after receipt of a memorandum of the kind described in subsection 7(a)(2), and 7(a)(3), if any, and at such time as the record is complete, the en banc coordinator shall call for a vote, by written memorandum addressed to all judges entitled to vote thereon, with information copies to senior judges and members of the panel, or at a Court meeting.

(3) Voting procedure: All available active judges shall vote upon the recommendation or request by sending their votes to the en banc coordinator, with copies to all associates and other panel members. Votes cast before the vote is called for shall be considered tentative only, so that any judge who wishes to do so (including a nonvoting judge) may express his views by a timely memorandum.

(4) Majority vote: The en banc coordinator shall report to the Court when votes reach a majority; if a majority is not reached within fourteen days from the date of the call, the coordinator will request a vote from any judge who has not voted.

(5) Agreement for en banc hearing: If a majority of the members of the Court in active service agree that the case should be heard en banc, an order shall be prepared by the requesting judge or the judge designated by the presiding judge of the recommending panel and forwarded to the Chief Judge for signature and filing with the Clerk, authorizing the withdrawal of the assignment of the case from the panel, providing for a rehearing en banc on a day to be fixed or stating that there shall be no further oral argument, stating whether additional briefs will be accepted or required, and specifying the question or questions with which the court, en banc, will be concerned. A copy of the order shall be supplied to all associates and panel members. The substance of the order, but not the vote upon en banc consideration, shall be communicated to the parties. After the opinion or opinions have been circulated, the en banc coordinator may assist in tallying the votes.

(6) Rejection of en banc hearing: If a majority of the members of the Court in active service vote not to hear the matter en banc, the en banc coordinator shall so advise the panel, which shall then determine what alternative course it shall follow and manifest the same by memorandum, opinion, or entry of an appropriate panel order. A panel order granting or denying a petition for rehearing which incorporated a suggestion for rehearing en banc rejected by the Court shall indicate the rejection, but not the vote thereon. The en banc coordinator shall notify the Clerk that the case has been returned to the panel, which panel shall thereafter be responsible for instructing the Clerk concerning the mandate.

(7) Judge voting in the minority: Whether a majority of the members of the judges of the Court in active service votes either to hear a case en banc or not to so hear the case, a judge voting with the minority shall have the right to request that the dispositive order concerning the en banc vote shall include the recitation of his minority vote. Moreover he shall have the right to file his dissenting views to the majority's action in either voting to take a case en banc or voting not to so take the case.

8. EN BANC COORDINATOR'S DUTIES WITH REFERENCE TO IRREGULAR PROCEEDINGS

(a) *Premature order denying and rejecting.*—When a panel presents to the Clerk for filing an order denying the petition for rehearing and rejecting the suggestion for rehearing en banc, the Clerk shall notify the en banc coordinator. If a panel by inadvertence presents such an order to the Clerk for filing during the running of the time (fourteen days) in which a member of the Court has the right to request a vote, the en banc coordinator shall inform the Clerk that the order is premature and shall instruct the Clerk to hold the order without filing it for twenty-four hours or such other time as the en banc coordinator may designate, but not to exceed the remaining time within which a member of the Court might request a vote.

(b) *Delay of a panel's order.*—Whenever the en banc coordinator causes the Clerk to delay the regular processing of any order presented by a panel, the coordinator shall immediately notify the author of the panel opinion and the senior member of the Court on the panel if the author is not a member of the Court. If no member of the Court calls for a vote within the time prescribed in this General Order, the author of the panel opinion or the presiding judge of the panel shall promptly instruct the Clerk to file the order denying and rejecting the petition for rehearing and the suggestion for rehearing en banc.

(c) *Filing of an untimely petition.*—If a panel allows the late filing of an untimely petition for rehearing with a suggestion for rehearing en banc, and the Clerk does not receive the order allowing the late filing in sufficient time to place copies of the untimely papers in the hands of the members of the Court who were not on the panel which decided the case until after the panel has already decided to deny the petition and reject the suggestion, the time in which a member of the Court may call for a vote does not begin to run until the late petition has been filed by the Clerk.

9. GALLEY PROOF

Whenever there is a request or suggestion for en banc reconsideration the author of the challenged opinion will not correct and return the galley proof to West Publishing Company until the en banc procedure has terminated. If the author of the original opinion is not a judge of this Court, then the presiding judge of the panel issuing the original opinion has the responsibility of assuring that the galley proof shall not be prematurely returned to West Publishing Company.

MR. WESTPHAL. For example, in paragraph 2(a) of that general order it says: "Any judge in active services may, without awaiting consideration of the suggestion by the panel, request that the en banc coordinator take a vote thereon". And 2(b) provides: "A request by a member of a court for an initial hearing en banc shall be addressed to all members of the court in active service with information copies to senior judges and the en banc coordinator shall call for a vote thereon". And I could go on and recite things from all of these rules contained in your general order number 15 but the thrust of them is that when there has been a suggestion of the necessity for an en banc hearing, either rehearing or initially, that every member of your court in active service is to be notified by the court or by the en banc coordinator of such requests. If it is a rehearing, some initial responsibility is given to the original three-judge panel, that heard it, but in any event, either before the recommendation of that panel, if it is a rehearing, or after the recommendation of that panel, if it

is a rehearing, any active judge on your court may take the position that that matter is important enough so it should be heard en banc and if a majority of the judges on your court agree with him, then that matter is heard en banc.

Is that basically what your procedure is?

Judge CHAMBERS. Yes, sir.

Mr. WESTPHAL. All right. Is it not drawn that way in order to promote this collegiality, this sense of participation which leads then to a willingness to be bound by whatever the law of the circuit is because each and every one of those active judges has had a voice in it? Is that not the purpose for it?

Judge CHAMBERS. Well, you cannot answer that without going into the history of it. Mr. Westphal, I forget the date of these Federal rules of appellate procedure, which forced it on us, the rule that every petition for rehearing should be considered by every member of the court. Prior to that, our rule was that a petition for an en banc was never considered by the whole court unless two members of the panel voted for en banc. Actually it was a very good rule.

Now, today we get about the same number of percentage of cases going en banc as we used to get under the old rule. But here is a terrible burden under this Federal appellate rule that those must be considered by every judge. We spend so much time in meetings arguing over whether we take the case en banc. It is not a loss of time on the cases that we decide to take en banc. It is a tremendous waste of time arguing about the cases we resolve not to take en banc.

Mr. WESTPHAL. Well, I think that gets down to this point, Judge. If what we are looking at, if all we are looking at, is efficiency, we could have the most efficient method by simply saying that any petition for en banc will be submitted to the chief judge of the court and he will rule as to whether it will or will not be heard en banc and you would not waste all that time in the discussion and depending upon the attitude of the chief judge of that court, you may have a lot of en bancs or you may have virtually no en bancs.

Now, it seems to me that the theory of the appellate rules which ordain that every judge of the court shall give consideration to a petition for an en banc hearing, and that whether it is granted or not will be decided by a majority of them, that the theory of that is that each judge should have a voice in it. The common law of this country, and the interpretation given the statutory law of this country, is such that its development and its pursuit in the interests of justice is enhanced on a multi-judge court by this kind of dialogue that goes on and the discussions and the arguments, even though they are heated, that go on when you are considering whether you should even hear it at all and particularly in the discussions you have after you have decided to hear it in conference after you have heard the argument.

Now, that to me, Judge, seems to be fundamental to the Anglo-American system of common law that we have and I think that the committee bill, S. 729, tends to preserve that, whereas I have the impression that the California plan which would exclude 11 judges from any kind of participation in that whatsoever, tends to defeat what has been for 200 years in this country and for many hundred years in England the basic philosophy.

Judge CHAMBERS. That may be so. It would be my guess that the California plan would eventually evolve in a few years into S. 729.

I think, Mr. Westphal, and this is our basic problem, you are assuming that that northwest circuit is dead.

Mr. WESTPHAL. I am not assuming it is dead, Judge. All I am assuming is that it will be some period of time before there will be an actual need for it and a justification for it.

Now, you have told us that you suspect that the California plan, if adopted, would in time develop into a division concept like S. 729. May I ask you this, Judge. Under the California plan you are starting out with the same number of judges provided in S. 729, that is, 20 judges.

Now, if the caseload continues to grow in California and in Arizona and in Nevada and in all other states in your circuit as it has in the past, we will in short order reach the point where 20 judges are insufficient and you are going to need 23 or 25 or 27, and when you reach a court of that size, it would be a situation where again only 9 out of 29 would be participating, 20 would be excluded, whereas under a division concept you would still probably not be exceeding 13 or 14 or 15 judges.

Judge CHAMBERS. Mr. Westphal, I would assume that that is when it would happen, when it had to go above 23.

Mr. WESTPHAL. Do you not think that there may be some advantage in a plan whereby you would start out with a division of 9 and a division of 11 which are relatively compact, where it is very easy to maintain an institutional unity in the sense of collegiality, and then as the caseload grows, you add a tenth judge to one and a twelfth judge to the other and you perfect it and work the kinks out of a new structure and new machinery, so when the day arrives that you are overwhelmed with caseload you are not going to have to suddenly go into a division concept with 14 or 15 judges in each division. Do you see any advantage to that?

Judge CHAMBERS. I see the arguments against the California plan. I simply say that with a court of 25 active circuit judges, we would have had more collegiality than we have had with the way we made up our teams. Today it is just a bailing wire court with the use of district judges. Do not think I am ridiculing any district judge. It is purely an accident that I do not work for them. It was not any selection made on merit. Of course, there are arguments against the California plan but I have no objection to trying it out. But, it is just my opinion, the two things on which I have a dedication are, first, the Commission's hardline across California making it two circuits, and the second, this northwest circuit.

Mr. WESTPHAL. If those are your two main points, Judge, you are going to be satisfied because there is no proposal before the subcommittee that will do that.

Senator BURDICK. Neither one.

Mr. WESTPHAL. I might say this, Judge, that I personally do not want to see you continue with a bailing wire operation. I would just as soon see you get a nice new, brand new combine. Of course, the combine consisting of two divisions.

I have no further questions.

Judge CHAMBERS. Well, thank you. May I comment that I think it is wonderful that through this hearing, or whatever you want to call

it, the last 18 months or 2 years, that we have been able to get through it without any of the bitterness that has accompanied every previous effort to reorganize the ninth circuit. I think it is remarkable that we have had very few sour notes on the thing, and we have tried to keep it on a high level. The commission has and this committee has. And I know the former Solicitor General expressed some unhappiness with us. I might add that we apparently seem to have good rapport with the present Solicitor General. And so I thank you for listening to me.

Mr. WESTPHAL. Mr. Chairman, before the hearing record is concluded, may I just insert this. I found the rule which specified where appeals will be heard, that is, in Los Angeles and San Francisco as the judge and I previously discussed and it is rule 3(c), and I would ask that the rule be inserted in the record.

Senator BURDICK. Without objection it will be received.

[The material referred to follows:]

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Effective July 1, 1968

(Revised as of January 22, 1974)

* * * * *

Rule 3

TIME AND PLACE OF HEARINGS

* * * * *

(c) Place of Hearings. Appeals and original writ proceedings arising in the Central and Southern Districts of California will normally be heard in Los Angeles. Appeals and original writ proceedings arising in the District of Arizona will normally be heard in Los Angeles or San Francisco. Appeals and original writ proceedings arising in the Northern and Eastern Districts of California and the District of Nevada will normally be heard in San Francisco. Appeals and original writ proceedings arising in the Districts of Alaska, Hawaii, Idaho, Montana, Oregon, Western Washington, Eastern Washington and the Territory of Guam will normally be heard in San Francisco, provided that, upon the written request of any litigant therein filed with the clerk on or before the filing of the first brief therein, that any such appeal or original writ proceeding be heard elsewhere than in San Francisco, the court, or a judge thereof, may order that an appeal or original writ proceeding, if arising in the Districts of Idaho, Montana, Oregon, Western Washington and Eastern Washington shall be heard in Seattle or Portland; if arising in the District of Alaska, shall be heard in a city of the State of Alaska or in Seattle or Portland; and if arising in the District of Hawaii or the Territory of Guam, shall be heard in Honolulu.

The court, upon its own motion, or upon the written request of a party filed with the clerk on or before the filing of the first brief therein, may designate a place of hearing other than as provided in the first paragraph of this rule.

* * * * *

Senator BURDICK. We will be in adjournment until 10 a.m. tomorrow morning. The letters and other material that I referred to in my opening statement will now be inserted in the hearing record.

[Whereupon at 12:10 p.m., the subcommittee recessed until 10 a.m. on Wednesday, May 21.]

STATE BAR OF NEVADA,
Reno, Nev., February 12, 1975.

Re Reorganization of Ninth Circuit.

HON. QUENTIN N. BURDICK,

Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: I recently succeeded Mr. Thomas A. Cooke as Chairman of the Committee on Judicial Administration of the State Bar of Nevada; and have now acquired his file pertaining to the matter in caption.

The members of the Federal Judiciary in Nevada, as well as membership of the Nevada Bar acknowledge the need to divide the Ninth Circuit into two parts. They would not favor having Nevada transferred into the Tenth Circuit.

The members of the Federal Judiciary in Nevada have both expressed a preference that, if the State of California is divided, Nevada be placed with Northern California rather than Southern California. Predictably, Nevada lawyers are divided on this point—those practicing in Reno and Northern Nevada would like to continue with Northern California; our Las Vegas and Southern Nevada brethren favor association with Southern California. I am informed that a majority of the Nevada-generated caseload in the Ninth Circuit originates in Southern Nevada; and lawyers are more numerous there than in Northern Nevada. These statistics may tilt the balance toward Nevada's being attached to Southern California.

To the best of my knowledge and information, and my ability to express it, the foregoing represents the consensus of Federal judges and lawyers in Nevada. If we may provide any specific information, or otherwise be of assistance in this matter, please feel free to call upon us.

Yours sincerely,

EARL M. HILL,
Chairman, Committee on Judicial Administration.

HAWAII STATE BAR ASSOCIATION,
Honolulu, Hawaii, March 7, 1975.

Reference: S. 729 (94th Congress).

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SIR: The Hawaii State Bar Association supports the objectives sought to be accomplished by this bill and favors the concept for accomplishing those objectives that are stated in the provisions of the bill. We have long recognized that the judges, and the administrative machinery, of the Ninth Judicial Circuit have been badly overworked and unable to keep pace with the ever-increasing caseload. We believe the Committee's bill to alleviate these problems is well designed to accomplish that purpose. We favor its enactment with such amendments as, in the legislative process, may be found to be appropriate.

Yours very truly,

DICK YIN WONG, *President.*

THE MONTANA BAR ASSOCIATION,
Helena, Mont., February 13, 1975.

SENATOR QUENTIN N. BURDICK,
Committee on the Judiciary
Washington, D.C.

DEAR SENATOR BURDICK: The Montana Bar Association has reviewed copies of the bill and committee report setting forth the proposal to reorganize the 5th and 9th Circuits.

Bearing in mind that Montana constitutes a minor portion of the problem, we make the following comments.

First, we would think a division of the 9th Circuit would be advisable and beneficial to Montana. It would speed appellate procedures.

Secondly, Montana would desire to remain in the 9th Circuit, with access to the Circuit Court of Appeals sitting in San Francisco and Washington and Oregon on Order of the Court.

Montana is in no position to advance any particular plan or idea as to the division other than as set forth.

Obviously, Montana is not in a position to comment on, or indeed, make any determination as to, the advisability of the solution as it relates to California and Arizona.

We conclude briefly, that Montana favors a division of the 9th Circuit, that it remain in the 9th Circuit, with the Court sitting in San Francisco.

Sincerely,

DOUGLAS R. DRYSDALE, *President.*

OREGON STATE BAR,
Portland, Oreg., February 14, 1975.

HON. QUENTIN N. BURDICK,

*Committee on Judiciary, Subcommittee on Improvements in Judicial Machinery,
U.S. Senate, Washington, D.C.*

DEAR SENATOR BURDICK: Appended hereto are copies of letter written by us to Oregon senators and representatives. This is in response to your letter of February 6, 1975 addressed to Lynn W. McNutt, Esq., Past Vice President of the Oregon State Bar.

The Board of Governors favors a split in the 9th circuit in the manner set forth in the enclosures.

Very truly yours,

JOHN H. HOLLOWAY,
Executive Director.

Enclosures.

OREGON STATE BAR,
Portland Oreg., February, 11 1975.

HON. MARK O. HATFIELD,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR HATFIELD: Set forth below is an excerpt from the minutes of a regular meeting of the Board of Governors held on January 24, 1975:

"Division of Ninth Court of Appeals.—Motion was made, seconded and carried (a) that the Board of Governors reaffirm its support of congressional legislation to split the 9th circuit into two circuits in accordance with the report and recommendation of the Commission to the Congress, the split, in the understanding of the Board of Governors, to result in the creation of two circuits, one to include Arizona and southern California and the other to include northern California and all other states now included in the 9th circuit; and (b) that the Secretary notify the ABA and all Oregon Congressional Senators and Representatives accordingly."

I think that the excerpt from the minutes is self-explanatory. The Board of Governors is the governing body of the Oregon State Bar. No action of the kind taken by the Board of Governors has been taken by the membership of the Oregon State Bar at an annual meeting, but I believe that the consensus of the Board of Governors is the same as that of a great majority of the membership of the Oregon State Bar.

If you have any questions, please let me know.

Very truly yours,

JOHN H. HOLLOWAY,
Executive Director.

Editors note: Other identical letters are omitted.

MOFFATT, THOMAS, BARRETT & BLANTON,
Boise, Idaho, December 17, 1974.

HON. QUENTIN N. BURDICK,

*U.S. Senator, Subcommittee on Improvements in Judicial Machinery,
Washington, D.C.*

DEAR SENATOR BURDICK: Your letter of December 2, 1974, to Thomas G. Nelson, President of the Idaho State Bar, together with a copy of a Committee Print of S. 2990, has been forwarded for comment.

I was designated by the Idaho State Bar to participate in the review of this matter at the time the Commission conducted hearings and took testimony concerning the Ninth Circuit.

In my opinion, the needs of the people of Idaho afford judicial services from the federal system would be adequately provided by this legislation. Several well considered proposals have been presented and S. 2990 seems to me to be yet one more. It has the advantage of keeping Idaho grouped with states familiar with the community property laws. The commerce of this area flows heavily toward our neighbors to the west and southwest, making it particularly convenient and reasonable that our judicial affiliations should be with the states of the Ninth Circuit, and, in particular, of what now is suggested to constitute the Northern Division of the Ninth Circuit.

With time and when the controlling considerations permit it, there may be further need for consideration of a new circuit servicing the states of the Pacific Northwest with chambers in Seattle, Washington or Portland, Oregon. At this time, however, the legal history of Idaho and California has so much in common and our ties with San Francisco are so strong that I am sure the proposal you have under consideration will prove convenient and reasonable for Idaho litigants concerned with the federal system. In particular, we see the proposal strengthening the judiciary with additional financial support and, therefore, applaud it as a progressive and worthy proposal.

If there is any thing in addition to this letter, Senator, that I or that the Idaho State Bar can provide to be of assistance in the presentation of the legislation, kindly advise.

Very truly yours,

EUGENE C. THOMAS.

WASHINGTON STATE BAR ASSOCIATION,
Seattle, Wash., February 20, 1975.

Senator QUENTIN N. BURDICK,
Senate Office Building
Washington, D.C.

DEAR SENATOR BURDICK: On February 6th, 1975, in your capacity of Chairman of the Subcommittee on Improvements in Judicial Machinery, you wrote to Kenneth P. Short, the President of the Washington State Bar Association. Mr. Short had a heart attack at about that same time and so has not had an opportunity to reply to your letter.

Just for the record, I wanted to write you to advise you that the Washington State Bar Association favors the creation of a Northwest Circuit and there is considerable material in your file outlining the details of this proposal and supportive material in connection with it. The Washington State Bar Association opposes any division of the current Ninth Circuit which includes us with any part of California.

Our President last year, Cleary Cone, testified in Washington, D.C. in connection with this matter and in the event there if further opportunity for us to be heard, we would appreciate that chance.

With best wishes to you, I am

Sincerely yours,

G. EDWARD FRIAR,
Executive Director.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Honolulu, Hawaii, March 24, 1975.

HON. QUENTIN N. BURDICK,
U.S. Senator,
Washington, D.C.

DEAR SENATOR BURDICK: I have studied the statement of Judge Ben. C. Duniway which was filed with your Subcommittee On Improvements of Judicial Machinery of The Judiciary Committee of The Senate. It pertains to S. 729, 94th Congress, introduced February 18, 1975, to create two divisions of the United States Court of Appeals, Ninth Circuit.

I am in favor of the bill with the modifications suggested by Judge Duniway in his statement, which statement I heartily endorse.

Sincerely yours,

HERBERT Y. C. CHOY.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT,
Seattle, Wash., March 24, 1975.

Re S. 729.

HON. QUENTIN N. BURDICK,
U.S. Senate, Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: Thank you for giving us the opportunity to comment on the new subcommittee bill, providing for the reorganization of the

Fifth and Ninth Circuits. I am grateful for the serious attention that you, your colleagues, and your Chief Counsel have given to our problems.

You have already had extended comments by some members of the court. Judge Duniway's memorandum indicates in its final paragraph that I was one of the Ninth Circuit judges who was generally in favor of the bill. He is correct, and I am pleased to endorse it in principle.

Judge Duniway has noted a problem with reference to Section 2 which would require a judge of this circuit to remain with the division which includes the state from which he was appointed. I agree with Judge Duniway that this would be a mistake.

I understand that your subcommittee needs to have a cutoff date which would serve to fix the number of active judges available to staff each of the two divisions, so that you would know how many vacancies would have to be filled. Perhaps, as an alternative to your Section 2, you might provide that each active circuit judge would have to make an election six months prior to the effective date of the act. A new judge who had just taken office would have to make his election at once.

Section 11(d)(1) causes me some trouble in its provision for the convening of a "joint en banc panel consisting of the four most senior judges in regular active service in each division." I agree with Judge Goodwin's comment on this plan. It would be far better, I suggest, to provide either selection of the panel by lot or by a system of rotation. I see no advantages to the seniority system and many disadvantages.

Sincerely yours,

EUGENE A. WRIGHT.

U.S. COURT OF APPEALS,
FOR THE NINTH CIRCUIT,
San Francisco, Calif., March 21, 1975.

Re S. 729—Reorganization of Circuits.

WILLIAM P. WESTPHAL,
*Chief Counsel, Subcommittee on Improvements in Judicial Machinery,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR BILL: I have examined with care the statement submitted to you by Judge Duniway on March 20, and I wish to confirm personally that I fully agree with all that Judge Duniway has to say.

Sincerely,

JAMES R. BROWNING.

U.S. COURT OF APPEALS,
FOR THE NINTH CIRCUIT,
Portland Oreg., March 4, 1975.

Re S. 729—Reorganization of Circuits.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Washington, D.C.

DEAR SENATOR BURDICK: I agree generally that the draft of S. 729 dated February 18, 1975, presents the best solution proposed so far to the administrative problems of the two largest circuits.

However, if the joint en banc panel in the Ninth should function to keep the two divisions of the circuit pulling in the same direction on California cases, why should it not work the same way on all intracircuit conflicts? Whether or not a decision in one division which is in conflict with a decision by the other division affects "* * * personal or property rights in the same state," a circuit with twenty or more judges ought to have this convenient method available for solving all its intracircuit conflicts. I should think this would also reduce pressure on the Supreme Court.

I would suggest that whenever a majority of the judges eligible to sit on the joint en banc panel are of the opinion that a conflict has occurred within the circuit (and the existence of a conflict is not always free from doubt), the joint en banc panel should have jurisdiction to resolve the conflict.

Under S. 729, we could have a situation in which a panel in the Southern Division decides a case affecting rights in Arizona. The case will, however, establish the law of that division in such a way as to bind the division a week later in a case arising out of the Southern District of California. The following week a Northern Division panel, sitting in San Francisco, could decide

differently an Idaho case which, a week later, would bind the Northern Division in a matter from Northern California. I see no virtue in waiting for the collision to occur within California when it becomes obvious that the two divisions are on a collision course.

Your committee might also want to consider whether the likelihood of purely local-law questions arising from the various California districts is as great as some of the California lawyers are predicting. In the past four years I can think of very few close questions that turned on state law, and none that approached en banc importance. During the same time, however, we have seen different panels create a number of intracircuit conflicts on federal questions affecting rights of individuals all over the circuit. Most of these questions have been resolved by taking one or more cases en banc. Frequently, the question whether or not to take a case en banc is more controversial within the court than the ultimate disposition of it after it has been taken en banc.

I mention these points only to suggest that the bill might be simplified and more useful if it would provide a uniform method for taking en banc all intracircuit conflicts, rather than just the very rare ones that are presently contemplated.

Finally, on the en banc business, I would much prefer that the joint panel members be drawn by lot from time to time as needed. The proposed plan, limiting en banc participation to judges of the top half in seniority, while commendable in terms of experience, could produce unfortunate stratifications on the types of cases most likely to involve policy, and hence most likely to be taken en banc. With the various executives exercising appointive power as they historically have exercised it, one could visualize a joint en banc panel consisting of appointees of a single administration, systematically overruling inconvenient cases decided by appointees of a different persuasion. Random selection not only would minimize this hazard, but would also minimize perhaps undue speculation by the bar and the press about the degree of the hazard even if in reality it should prove to be largely an illusory one.

Apart from en banc matters, which have been my principal concern because I am presently the en banc coordinator for our court, I have one other suggestion. I wonder if it is necessary or advisable to lock circuit judges into the states from which they were originally appointed. If, prior to the enactment of S. 729, a circuit judge from Tucson or San Diego moved his residence to San Francisco, he shouldn't be compelled to move to Los Angeles merely because his original appointment has marked him as Southern Californian or an Arizonan. I have no present plans to move to Los Angeles, and, indeed, were I living today in Los Angeles I might be sorely tempted to move to Portland, but I would prefer not to have my option foreclosed by act of Congress.

I appreciate your thoughtfulness in keeping us informed.

Yours very truly,

ALFRED T. GOODWIN,
U.S. Circuit Judge.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Portland, Oreg., December 10, 1974.

Re Reorganization of Fifth and Ninth Circuits.

Hon. QUENTIN N. BURDICK,

Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, Dirksen Office Building, Washington, D.C.

DEAR SENATOR BURDICK: I am fascinated with the Committee Print of S. 2990, dated December 2, 1974, and the Report of the Subcommittee.

It seems to me that the proposed legislation retains all, or practically all, of the worthwhile proposals of Chief Judge Chambers and the Oregon judges. The fact that the present proposal does not include certain administrative features suggested in the Oregon plan is of no major consequence. Needless to say, I have not had an opportunity to study the Subcommittee's proposal in detail. Thus far, it seems quite acceptable.

I note the proposal uses "en banc", rather than "en banc." Inasmuch as "in banc" is presently used in both 28 U.S.C. § 46 and Rule 35, Federal Rules of Appellate Procedure, I suggest that "in banc" should be carried forward in the present proposal.

The proposed legislation might be more acceptable to some of the circuit judges if it contained a grandfather clause under which circuit judges in of-

file, on the effective date of the legislation might move from division to division on the consent of the division chiefs.

My congratulations to you and Mr. Westphal on what I believe to be a significant move in the right direction.

Sincerely,

JOHN F. KILKENNY.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Portland, Oreg., March 6, 1975.

Re S. 729, Reorganization of Circuits.

HON. QUENTIN N. BURDICK,
*Chairman, Subcommittee on Improvements in Judicial Machinery,
Committee on the Judiciary,
Dirksen Office Building, Washington, D.C.*

MY DEAR SENATOR: In general, I agree with everything that is said in Judge Goodwin's letter to you dated March 4th.

However, I hold firmly to the view that what the Ninth Circuit needs, more than anything else, is the creation of a substantial number of new circuit judgeships. The need is now.

Sincerely,

JOHN F. KILKENNY.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Phoenix, Ariz., March 24, 1975.

Re S. 729—Reorganization of Circuits

HON. QUENTIN N. BURDICK,
*U.S. Senator,
Washington, D.C.*

DEAR SENATOR BURDICK: I had not thought it necessary to burden your subcommittee with my views on S. 729 since others have heretofore expressed my concerns with its technical problems. However, the views of judges are now being offered by name and it is thus fitting that I briefly add mine to the collection.

At the present time I am an active judge of the United States Court of Appeals for the Ninth Circuit. It has been my privilege to serve in that position for five and one-half years.

I have from the beginning felt that given more judges and adequate supporting staff, the Ninth Circuit could satisfactorily handle its work load without any deterioration in quality or loss of expedition. During a period of several years in the 1960s when the volume of cases was increasing at a near explosive rate the court did not have the judges or the staff support to handle the filings, and the increase of filings over dispositions created a backlog that required emergency action. The court was thereafter increased in numbers, and in recent years we have obtained more staff assistance. We have developed procedures to expedite dispositions. Our criminal case backlog has disappeared and if we are given more judge and adequate staff and the court is promptly maintained at full strength, in my opinion we can continue the Ninth Circuit intact and at the same time avoid the problems known and unknown that are involved in a split or in two divisions.

With respect to the number of additional judges, I would like to see the court have four to six additional active judges immediately and an evaluation made of the needs of the clerk's office and legal staff.

I do not believe a court of seventeen or even nineteen (an odd number suits us best for en banc situations) would be an impractical number for purposes of panel consideration and occasional en banc sitting. The en banc situations could be worked out on a lesser number than the full court, perhaps with a rotating membership.

In my consideration of the bill I have not addressed the technical problems of dividing California either by splitting the circuit or by creating two divisions. The latter alternative appears to me to contain all of the problems of the first. These difficulties have been analyzed by Judge Hufstedler and by representatives of the California bar. I would subscribe to those same concerns and urge the subcommittee to adopt a plan along the lines of the less radical surgery that I have outlined.

I also note with concern the fact that in the first draft of the bill judges were given a deadline for making a choice of residence and circuit. In later drafts that choice has been omitted. The right of a judge to select his residence at any location within the circuit has been his throughout the history of the court. Whatever my personal choice may be, I would like to see that opportunity restored.

Yours sincerely,

OZELL M. TRASK.

U.S. DISTRICT COURT,
DISTRICT OF MONTANA,
Missoula, Mont., March 24, 1975.

Re S. 729; Division of the Ninth Circuit.

Hon. MIKE MANSFIELD,
*U.S. Senate,
Washington, D.C.*

DEAR MIKE: I am writing with respect to S. 729 which divides the Ninth Circuit into two divisions. I have talked with Judges Jameson and Battin (Judge Murray is ill and I could not reach him) and they agree with me that S. 729 is a competent solution for a difficult problem. We all think that if the Circuit were increased in size to 20 judges, which is about what is needed, it would be completely unmanageable. We all think that any division of the Circuit which leaves California (which produces 64.2% of the business) intact would not solve anything. The division of the district into divisions will speed up the disposition of appeals from Montana and has no disadvantages so far as Montana is concerned.

With kindest personal regards,
Sincerely,

RUSSELL E. SMITH.

U.S. COURT OF APPEALS,
FOR THE SIXTH CIRCUIT,
Cincinnati, Ohio, December 11, 1974.

Re S. 2990.

Hon. QUENTIN N. BURDICK,
*Chairman, Subcommittee on Improvement in Judicial Machinery,
U.S. Senate, Washington, D.C.*

DEAR SENATOR BURDICK: In response to your letter of December 2, I have examined your proposed revision of the Bill for the reorganization of the Fifth and Ninth Circuits.

I consider your amendment to be a masterpiece in the art of compromise of a question which appeared to be beyond solution. I think your proposal for an en banc solution of conflicts between the two divisions of the Ninth Circuit with respect to California cases is a stroke of genius.

I am happy that the House Judiciary Committee yesterday approved S. 663, which you sponsored in the Senate. I am sure that every federal Circuit and District Judge in the United States and every Justice of the Supreme Court join me in the hope that the House will pass this Bill and send it to the President before the adjournment of the present Congress.

I had an interesting visit with Mr. Westphal while I was in Washington. The good work of your Subcommittee is appreciated by the federal judiciary.

Sincerely,

HARRY PHILLIPS,
Chief Judge.

PEPPERDINE UNIVERSITY,
SCHOOL OF LAW,
Anaheim, Calif., March 14, 1975.

Re Reorganization of Ninth Circuit.

Hon. QUENTIN N. BURDICK,
*Judiciary Committee,
Old Senate Office Building,
Washington, D.C.*

DEAR SENATOR BURDICK: I am writing to express concurrence with the reorganization and the compelling need to divide the State of California where

in excess of two-thirds of the caseload now originates. The current practice (called "expediency" in the Senate Report) of assigning district court judges to sit on panels of the circuit courts in order to handle their caseload (a) is not consistent with the concept of having appellate judges handling appeals, and (b) has not resulted in avoiding the excessive delay extant today.

Accordingly, I wish to express disagreement with the apparent view of the San Francisco Bar Association Special Committee calling for a "crash program of special panels to reduce the large backlog" and the concept of simply adding many more judges to an already unmanageable circuit. This "fire-fighting" approach can be disastrous if followed by your Committee solely to appease those who recommend "that the State of California be kept intact."

There exists no "fundamental" reason for preserving the unity of California as an "institution" in the Federal Court System. In fact, the greatest advance in this system since the previous century will be the division of the circuit recommended by the Commission on Revision of the Federal Court Appellate System—at least insofar as diversity cases are concerned. In my view, the mere existence of two divisions or circuits in this state may force each of them to thoroughly consider judgments of its counterpart (to North or the South as the case may be) because the divergence itself may constitute the necessary element to achieve review by the U.S. Supreme Court or, if not, the State of California through its courts or its legislature may then choose to resolve any such divergence—which itself is a healthy process in these increasing instances where the circuit courts have taken over the legislative process and done so in different ways. Judge Duniway of the Ninth Circuit has testified that in 13 years of the federal bench he has never heard of conflict of opinions among the three-judge courts; however, assuming some conflicts do arise between two circuit courts in interpreting California law, this is not a fundamental reason against "splitting" a state under our federal system.

Sincerely,

W. NOEL KEYES,
*Associate Professor of Law,
Director of Clinical Law.*

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,
Sacramento, Calif., February 14, 1975.

Re S. 2990, Committee print December 2, 1974: Realignment of 9th Judicial Circuit.

HON. QUENTIN BURDICK,
*Chairman, Subcommittee on Improvements in Judicial Machinery, U. S. Senate
Judiciary Committee, Washington, D.C.*

DEAR SENATOR BURDICK: We appreciate receiving the revised Committee print of S. 2990 with the Committee's proposed report of same date.

This revision represents a substantial improvement over the original proposal of the Commission on Revision of the Federal Court Appellate System on Revision of the Federal Court Appellate System. We are grateful for the patience and thoughtfulness which the Subcommittee has given us, and for the thoughtful manner in which the objections of this office and others have been noted in the course of hearings on that proposal.

As revised, S. 2990 does not split the State of California into two separate judicial circuits. Instead, however, it creates two divisions within the existing Ninth Circuit; a northern division composed of nine judges and consisting of Alaska, the eastern and northern districts of California, Hawaii, Idaho, Montana, Oregon, Washington, and Guam; and a southern division staffed by eleven judges and composed of Arizona, the central and southern districts of California, and Nevada.

Cases and controversies in the two divisions are to be heard and determined by a panel of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the judges of the circuit or division who are in regular active service (Section 46c).

Thus, for all practical purposes the creation of two divisions, each with its own provision for separate en banc hearings, could result in the same conflicts in the interpretation of laws applicable to the entire State of California as those which we had anticipated in our previous testimony before the Subcom-

mittee. In earlier testimony we had indicated several possible problems which could be caused by the creation of two separate circuits in the State of California.

1. Actual conflict between decisions of the two courts of appeal.

2. The uncertainty resulting from potential conflict from the decisions of two state courts of appeal.

The amended S. 2990 proposes to meet the problem of actual conflicts by providing for a joint "en banc" panel, consisting of the four most senior judges in regular active service in each division, which would be convened by the senior chief judges of the two divisions in either of two instances:

1. Upon certification of a conflict between any decision by a division and that of the other division and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, state or federal, which affects personal or property rights in the same state; or

2. Upon petition of a party filed within ten days of a decision by the division which is in conflict with the decision of the other division. Sec. 46(d), Sec. 1291.

This proposal, while representing an improvement over the one previously made, presents several serious problems:

1. It fails to deal with the possibility of conflict which must necessarily give uncertainty to state programs of statewide application, as well as to the enterprises of private business.

2. It creates the possibility of four separate layers of judicial decision-making before certainty may be reached:

- a. The decision of the federal district court.

- b. The decision of a panel of the court of appeal of one division.

- c. The decision en banc on petition for rehearing of the same division.

- d. The decision of the joint en banc tribunal.

Thus, the proposal would cause additional time and duplication rather than streamlining the judicial process. As an alternative, we propose augmentation of the existing court by seven judges, retention of the present administrative structure, and utilization of a reduced en banc panel for all en banc proceedings of the court. Such an en banc court of nine judges should be able to reconcile both potential as well as actual conflicts.

The manner of selection of the joint en banc panel would necessarily be controversial. However, such controversy cannot be avoided and would exist in any event in the creation of the joint en banc panel contemplated by S. 2990 in its amended form. Seniority as one possible basis—as contemplated in the revised bill—would be acceptable. However, the Subcommittee should consider the possible need for added flexibility. One solution might be the delegation to the court of the authority to provide for other selection procedures by rule.

Additionally, the Subcommittee should consider the desirability of establishing criteria by which the en banc hearing would be granted. And, as we expressed in previous testimony, more thought should be given to the initial question of federal jurisdiction, which has expanded so widely over past years. We hope to have the opportunity of commenting in more detail on these matters in the near future.

We appreciate the courtesy and consideration of the Subcommittee in providing us with this revised bill and soliciting our comments. Senate Bill 2990 has been substantially improved over previous versions. However, it remains a measure that could cause serious problems for this State. We respectfully urge the Subcommittee to adopt the additional modifications set forth above. The addition of needed judges and adoption of a smaller, more workable en banc panel would, we believe, meet the demonstrated needs of the Ninth Circuit and at the same time avoid possibly serious impediments to the effective administration of state programs.

Your Subcommittee Counsel has advised us that a new bill will be introduced in the near future. We respectfully request an opportunity to analyze it, to provide written comments, and to testify at any further hearings the Subcommittee may hold on this subject.

Very truly yours,

EVELLE J. YOUNGER, *Attorney General.*

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,
Sacramento, Calif., April 25, 1975.

Re S. 729: Reorganization of the Ninth Circuit.

Hon. QUENTIN BURDICK,

Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR BURDICK: This is with reference to the rescheduled hearings on S. 729 now set for May 20 and May 21 before your Subcommittee on Improvements in Judicial Machinery. I regret that we will be unable to appear at these continued hearings. We respectfully request that the statement heretofore filed with the Subcommittee be made part of its record.

We wish to reiterate our appreciation of the willingness of the Subcommittee and its staff to discuss constructive approaches to the problems of the workload in the Ninth Circuit. At the same time, we must re-express our strong concern over a proposed reorganization which would, in effect, split the circuit into two separate parts and cause unnecessary delay in the resolution of important questions affecting the State as a whole. We respectfully suggest that the best solution is that proposed by the State Bar and discussed by Justice Hufstedler in her testimony at the March hearings.

We recommend that the Ninth Circuit immediately be increased to 20 judges, and that a nine-judge "en banc" panel be established, based initially on seniority as Justice Hufstedler suggested.

Please feel free to contact us should additional questions or issues arise in the course of your consideration of this legislation.

Very truly yours,

EVELLE J. YOUNGER, *Attorney General.*

STATEMENT OF CALIFORNIA ATTORNEY GENERAL EVELLE J. YOUNGER

We join with this Subcommittee in recognizing that efforts are needed to deal with the growing workload and administrative problems of the Ninth Circuit. Senate Bill 729 represents an imaginative and improved vehicle for dealing with these serious problems. It provides for a thoughtful and needed procedure, for imposing relative uniformity on local rules of procedure. It would give the Ninth Circuit a badly needed increase in judicial manpower by increasing the total number of judges from 13 to 20. We join the Subcommittee and its Chairman in urging that these actions be taken to solve the Ninth Circuit's pressing workload problem.

However, we suggest that Senate Bill 729, in its present form, creates serious possibilities of confusion and delay in obtaining needed finality in federal decisions affecting state law and the implementation of state programs. Senate Bill 729 would, in effect, divide the State of California and provide additional delay in the finality of federal decisional law. In its 1973 report, the Commission on Revision of the Federal Court Appellate System stated: "Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents." Report, Commission on Revision of the Federal Court Appellate System (December, 1973). Clearly, this bill would have that effect.

Senate Bill 729 creates two divisions within the existing Ninth Circuit: divisions which in effect would divide the eastern and northern districts of California from the central and southern districts. Cases in the two divisions would be heard and determined by three-judge panels unless a hearing or rehearing before the court en banc were ordered. Sec. 46c. Thus, for all practical purposes, the creation of two divisions, each with its own provision for separate en banc hearings, could result in the same conflicts in the interpretation of laws applicable to the entire State of California as those which we had anticipated in our previous testimony before the Subcommittee with respect to S. 2988-2990 last year. In this earlier testimony we had indicated

several possible problems which could be caused by the creation of two separate circuits in the State of California:

1. *Actual conflicts* between decisions of the two courts of appeal.

2. The uncertainty resulting from *potential conflicts* between the decisions of two courts of appeal not yet handed down.

Senate Bill 729 proposes to meet these problems by providing for a joint en banc panel consisting of the four most senior judges in regular active service in each division, which would be convened by the senior chief judges of the two divisions. The joint en banc panel would have jurisdiction only over decisions of one division which (1) conflict with a decision of the other division, and (2) affect "the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same state." Sec. 129(b).

This proposal presents several problems:

1. It creates the possibility of five separate layers of judicial decision-making before certainty may be reached:

- a. The decision of the federal district court.
- b. The decision of a panel of the court of appeal of one division.
- c. The decision en banc on petition for rehearing in the same division.
- d. The decision of the joint en banc tribunal.
- e. An ultimate review by the U.S. Supreme Court.

And, of course, prior or concurrent state court proceedings could and often do occur.

2. By requiring an *actual* conflict between divisions of the circuit, this provision fails to deal with the *possibility* of conflict which must necessarily give uncertainty to state programs of statewide application, as well as to the enterprises of private business. This possibility cannot be taken lightly. In our previous statement to the Subcommittee we pointed out, for instance, that there is an urgent necessity for finality now with respect to such important rules of statewide applicability as:

a. The ownership of geothermal resources in lands patented by the federal government and subject for reservation of minerals, *U.S. v. Union Oil Co. et al*, 369 Fed. Supp. 1249.

b. Interpretation of the various federal statutes involving the welfare program, e.g., *Bryant v. Carleson*, 444 Fed. 2d 353; 465 Fed. 2d 111 (9th Cir. 1972); and *Homemakers Inc. v. Div. of Industrial Welfare*, 356 Fed. Supp. 1111 (N.D. Calif., appeal pending); and

c. California's billion dollar water project, which runs the length of the state with projected deliveries to 30 water distribution agencies, and is presently challenged on multiple grounds in the Northern District of California in *Sierra Club v. Morton et al*, No. C-71-CBR.

We further pointed out the existence of at least 23 federal statutes granting direct state appeal to the Ninth Circuit from federal actions in such diverse programs affecting this state as educational aid, student incentive grants, tax revenue sharing, EPA water quality actions, and state community grants for the aging, as well as LEAA grants.

3. Proposed section 1291(b) requires a decision affecting a statute or administrative order, rule, or regulation of the State or Federal government. In so doing, it ignores the real possibility for uncertainty in the administration of criminal law raised by the invalidation of a city or county ordinance. Identical or similar ordinances may be and are adopted by various local governments, and their constitutionality may be differently interpreted. For instance, the California Supreme Court has upheld the validity of certain topless ordinances of both Sacramento and Orange Counties, and certiorari has been denied by the U.S. Supreme Court, *Reynolds v. City of Sacramento*, *Crownover v. Musick*, 9 Cal. 3d, 405, cert. denied 415 U.S. 931 (1974). However, in a similar case in the Second Circuit, a contrary decision was reached and probable jurisdiction noted by the U.S. Supreme Court, *Salem Inn Inc. v. Frank*, 501 Fed. 2d 18, probable jurisdiction noted, No. 74-337. Last fall, we pointed out to the Subcommittee a number of fields in the criminal law in which diversity of decision would have adverse effects on the uniform administration of justice. These decisions have proliferated even since our last statement. They include:

a. *Prison regulations*. We pointed out last year that the Department of Corrections maintains institutions throughout the state. Different rules from dif-

ferent circuits or divisions of the same circuit could raise insurmountable administrative problems in such areas as prison management and control, i.e., *Procunier v. Martinez*, 416 U.S. 396 (mail regulation and access to media); *Pell v. Procunier*, 417 U.S. 817.

b. *State habeas corpus*. The applicability of review to state habeas corpus is in doubt. Contrary to the state's interpretation, the Ninth Circuit has held that denials without opinion in state habeas corpus cases are to be considered as rulings on the merits, *Harris v. California*, 500 Fed. 2d 1124 (petition for cert. pending).

c. *Probation revocation*. The revocation of probation cases is still in considerable confusion. Since the decisions of the U.S. Supreme Court in *Morrissey v. Brewer*, 408 U.S. 417 and *Gagnon v. Scarpelli*, 411 U.S. 778, numerous cases have arisen and are pending relative to the law concerning state prisoners. Diverse decisions are a possibility until resolved by the U.S. Supreme Court, cf. *McDonnell v. Wolff*, 418 U.S. 539 (1974).

d. *Post conviction remedies*. In this field, federal courts have deviated from state interpretations and contrary results have been reached. In *Michigan v. Tucker*, 94 Sup. Ct. 2357, the circuit court was reversed. The Supreme Court has currently granted certiorari in two other cases involving the same problems, *Brown v. Illinois*, 73-6650 and *Oregon v. Haas*, 73-1452.

e. *Federal procedural rules*. As we pointed out previously, in the Central District of California local rules were adopted permitting magistrates to hold evidentiary hearings in habeas proceedings involving state prisoners. However, in *Wingo v. Wedding*, 418 U.S. 461 (1974), a similar rule, adopted by the District Court of the District of Kentucky, was held invalid.

f. *Pornography law*. State law enforcement was presented with conflicting decisions in the field of pornography. For instance, in *People v. DeRenzy*, 275 Cal. App. 2d 380, the State Court of Appeal held that a prior adversary hearing was not required, whereas a contrary result was reached by the Ninth Circuit in the same case, *Demich v. Ferdon*, 426 Fed. 2d 643 (1970). As a result of a decision in *Heller v. New York*, 413 U.S. 483 (1973), the result of the *Demich* case was overturned. However, in the meantime state law enforcement was presented with conflicting decisions.

We should not have to wait for the decision of yet another en banc court if indeed such a hearing is granted to resolve such questions.

AN IMMEDIATE REMEDY IS AVAILABLE

We suggest that there is considerable merit in Senate Bill 729, and that if the objectionable added layer of review in the form of a federal joint en banc proceeding is eliminated, the bill should be adopted. In this respect we concur with the recommendations of the State Bar of California, which has filed thoughtful suggestions. We propose, therefore, that the Subcommittee take prompt action to recommend legislation which does the following things:

1. Adds 7 judges to the Ninth Circuit. The need for such additional manpower is beyond doubt.

2. Retains provision for the review and implementation, to the extent practicable, of uniformity of rules throughout the Circuit.

We are mindful of the administrative difficulties inherent in providing en banc hearings by a 20-judge court. We suggest that a constructive alternative is provided by the State Bar proposal for en banc hearings by a nine-judge court to be selected on the basis of precedence. A joint en banc court for all purposes would be able to reconcile both potential as well as actual conflicts. Initially it should utilize criteria set forth in Federal Rules of Appellate Procedure, 35a, i.e., hearings should be granted:

- a. When consideration by the court en banc is necessary to secure or maintain uniformity of its decisions; or

- b. When the proceeding involves a question of exceptional importance.

However, in light of the increasing need for uniformity of decision, we suggest an additional criterion be adopted and incorporated in the Subcommittee's bill if the joint en banc panel is established. As the Subcommittee's 1974 report points out, en banc decisions have been rare during past years in the Ninth Circuit. We suggest that a third criteria be included for en banc jurisdiction; i.e., on certification of the U.S. or State Attorney General that an

actual or potential conflict of significance exists between the decisions of the two panels of the court. Such a criterion would ensure prompt resolution of those questions of statewide importance which should be resolved promptly if the state is to conduct its business and adequate certainty is to be provided. At the same time, by limiting such certification to the U.S. or California Attorney General, there is some assurance that the en banc court will not be swamped with work.

The federal judiciary is inextricably enmeshed with the laws and programs of the State of California. To the extent that simplicity and finality can be given to its decisions, the people of California will benefit. We stand ready to work with the Subcommittee toward achieving such laudable goals.

CIRCUIT REALIGNMENT

WEDNESDAY, MAY 21, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick (presiding, and Scott of Virginia).

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. In the last Congress, the subcommittee held 6 days of hearings on legislation proposing to reorganize the fifth and ninth circuits as recommended by the Commission on Revision of the Federal Court Appellate System. Today is our fourth day of hearings on the same subject matter in the 94th Congress. Hopefully, it will be our last day of hearings.

Today we have scheduled two witnesses representing the Bar Association of the State of California, who are here to support the Tunney-Cranston printed amendment to S. 729. As I stated yesterday, the printed amendment was suggested by the California Bar Association. It proposes an alternative solution to the problems of the ninth circuit. While S. 729 proposes two divisions, one a nine-judge division and the other an 11-judge division, the proposal of the California State Bar Association, which Judge Chambers refers to as the "California Plan", would have all 20 judges appointed to one court, with only nine of the judges serving as the en banc court.

Before calling our first witness, let me say that the subcommittee will now receive the prepared statement of Judge Ben C. Duniway of the ninth circuit. Judge Duniway had intended to be present today, but I am advised that, unfortunately, he has injured his back and upon medical advice, he could not travel cross country to our hearing. I might say that I regret Judge Duniway's inability to be here. His statement addresses itself to several important points and he makes several suggestions for perfecting amendments. I urge all to read his statement.

[The prepared statement of Judge Duniway follows:]

STATEMENT OF BEN. C. DUNIWAY, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Mr. Chairman and Members of the Subcommittee: My name is Ben. C. Duniway and I am a United States Circuit Judge, an active member of the United States Court of Appeals for the Ninth Circuit. I have been a member of the

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court for thirteen years, and before that, I was a Justice of the District Court of Appeal, First District, Division One, of the state of California at San Francisco. I began the practice of law in San Francisco in 1933, and practiced there until 1959, except for a five and one-half year interval, 1942 to 1947, as a government attorney and administrator during World War II.

Last fall I appeared before you in support of the recommendation of the Commission on Revision of the Federal Court Appellate System that the Ninth Circuit be divided into two circuits: a new Twelfth Circuit embracing the Central and Southern Districts of California and the states of Arizona and Nevada, and a new Ninth Circuit embracing Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California. I also filed a statement in which I set out in detail my reasons for favoring the Commission's recommendation.

I now appear before you in support of S.729, which accomplishes most of the things that would have been accomplished by the recommendation of the Commission, but, instead of dividing the Ninth Circuit into two new circuits, creates within the Ninth Circuit two divisions—a Northern and a Southern Division, each of which would have the same territorial jurisdiction as the two new circuits that the Commission proposed.

In the statement that I filed with the Committee last fall, I gave reasons why I opposed a suggestion that had been made by some of my colleagues on the Court of Appeals for the creation of two new divisions within the circuit. In my opinion, S.729 answers practically all of those objections. As I stated in a letter that I wrote to the Chairman of your Committee under date of December 19, 1974, to me the most important features of S.729 are first, that it creates two substantially independent courts small enough to function efficiently as collegiate bodies, and second, that it provides sufficient judicial manpower to enable each of those courts to catch up its backlog and to keep current with its work. I do not intend to repeat the testimony that I gave before your Committee last fall nor the arguments that I set out in the statement that I then filed. My purpose in appearing before you now is to indicate why I support S. 729, and to answer as best I can some of the objections that have been made to S. 729.

The workload situation of the Court of Appeals for the Ninth Circuit as I described in my statement has not changed materially. During the first half of fiscal 1975 (July through December, 1974), the number of appeals filed was 162 less than were filed during the corresponding period in fiscal 1974 (the months of July through December, 1973). It appears, however, that this drop is temporary. During the first two months of 1975, 527 appeals were filed as compared with only 443 in the first two months of 1974. This is the highest number of cases filed in January and February in any year. On March 11, 1975, there were 601 civil cases fully briefed but not calendared. Some are two years or more old. The figure is the same as it was last September. We have not fallen further behind, but neither have we gained. Thus the caseload problem which I described in my previous statement still exists without any substantial relief. Moreover, the problems arising from the extended geography of the circuit are still with us and they are still contributing to our problems of internal administration and to our problem of maintaining the collegiality of the Court of Appeals for the Ninth Circuit. Thus all of the reasons for dividing the circuit that then existed are extant today.

I favor S. 729, in spite of the fact that it creates two new divisions rather than two new circuits, for two reasons. First, as I read the bill, each division will for nearly all purposes be a separate court functioning as such, and independent of the other division. Each division will be of such a size that it can function as a collegiate court ought to function. The amount of travel required will be reduced. (The reduction will be greater in the Southern Division, which will have the larger caseload, than in the Northern Division.) Moreover, the volume of paper flowing through the Clerk's office in each division will be far less than the volume of paper now flowing through our Clerk's office. That office is swamped and is not able to render efficient service either to us or to the Bar. In addition, with the additional manpower to be provided for each division, there will be enough active judges so that they should be able to handle the entire caseload without the necessity of bringing large numbers of visiting judges to sit with the court as we have been doing during the past several years. For example, in 1974, we had 59 different visiting judges who sat with us. This has produced a reaction from members of the Bar which is

epitomized in a statement made by one of them—that as it now functions the Ninth Circuit is not a court but a judicial slot machine.

Second, the bill provides what seems to me to be a reasonable answer to the fears of members of the Bar and others in California that somehow there will be numerous conflicts between the two divisions about what the law of California is, and about the application of federal law within California. This is accomplished through the creation of a special en banc panel (the joint en banc panel), which is provided for in Section 11 of the bill, adding subdivision (d) to 28 U.S.C. § 46. The jurisdiction of that panel is defined in Section 25 of the bill by amendment to Title 28 U.S.C. §1291, subsection (b).

The principal objections to the bill appear to be of two sorts. One comes primarily from the California Bar which is opposed to any action which appears to divide the state of California. A part of this opposition, I am sure, is sentiment, and, as a Californian, I share the sentiment, but I am not willing to see sentiment defeat what appears to me to be a valid and sensible solution to a most serious problem. The major objection stems from a fear that there will be conflicts between the two divisions as to what the law of California is, or as to what the federal law as applied in California is, or both.

In the statement that I filed last fall, I stated at some length the reasons why I believe that these fears are largely unjustified. My view was based, and is now based, on more than thirteen years of experience as a member of this court. In my statement I pointed out that under the present division of responsibility between district courts in California, including the three-judge district courts, such conflicts have not been a problem. So far as I know, the Supreme Court has never had to exercise its direct appellate jurisdiction over decisions of the three-judge courts sitting in the various California districts for the purpose of reconciling conflicts between them. Similarly, so far as I know, this court has never had to exercise its appellate jurisdiction for the purpose of reconciling conflicts between single district judges sitting within California as to California law or the application of federal law in California. I recognize that there is a possibility that such conflicts can arise between two autonomous divisions, each having jurisdiction over a part of California, but I see no reason to believe that such conflicts would be any more likely between those two courts than they have been between three-judge district courts or single-judge district courts in the past.

I think, too, that the method of settling those conflicts, which is provided for by means of the joint en banc panel established in the bill, is a sensible and simple method of solving those conflicts. I find it impossible to believe that the members of the joint en banc panel, knowing their responsibility to the law and to the Bench and Bar and people of California, would decline to settle such conflicts if any should actually arise.

The other principal objection to the bill is based upon what I believe to be a misconception of what the bill does. It is stated at length in the statement of my colleague, Judge Hufstедler, which she has filed with you. I am convinced that her objections, and similar objections coming from the Bar of California, are based upon a misconception about the bill.

As I understand the bill, each division will be, in fact, a separate court of record just like any other circuit court. It can settle conflicts of the type that arise within its jurisdiction, that is, conflicts between its own panels, by sitting en banc in the same manner in which all other circuit courts sit. If there were a conflict between the Northern and Southern Divisions, of a sort that does not fall within 28 U.S.C. § 1291(b), as it would be amended by Section 25 of the bill, that conflict will be settled in the same manner as that in which conflicts between circuit courts are now settled, namely, by the Supreme Court of the United States. Thus there will be no more layers of courts to go through in relation to such questions than there now are. The only difference will be that there will be thirteen courts, conflicts between which must be resolved by the Supreme Court, rather than eleven. This will undoubtedly add something to the workload of the Supreme Court, but I do not think that it will add enough to make an appreciable difference in that workload. Moreover, there are now pending before the Commission on Revision of the Federal Court Appellate System proposals for the creation of some kind of national court which will help to relieve the Supreme Court of some of its burdens, and specifically the burden imposed by inter-circuit conflicts. I suggest that this is the best manner in which to solve the problem of conflicts between circuits and divisions.

Again, as I understand the bill, there will be no overall en banc court of the entire circuit which will undertake to dispose of conflicts between the two divisions that do not fall within the special jurisdiction of the new joint en banc panel.

The joint en banc panel provides a different level of review, but I feel confident that in operation it will not be an additional level of review. Under the rules of the courts as they now stand, a party seeking a hearing en banc must seek it within the time within which he can petition for a rehearing by the panel. Our experience has been that a high proportion of petitions for a rehearing carry with them a suggestion for a rehearing en banc. I would expect this practice to continue. If a petition for a rehearing en banc is based upon a claimed conflict between divisions falling within the new jurisdiction of the joint en banc panel created by § 1291(b), that petition would be considered by the joint en banc panel rather than by the judges of the division involved. Thus there would be but one hearing en banc for such a case. The difference would be that the hearing would be before the joint en banc panel rather than by the division sitting en banc.

It is conceivable that in a particular case a division would have heard the case en banc and thereafter the joint en banc panel, feeling that there was a conflict affecting California between the decision of that division and a decision of the other division, would then take the case to be heard before the joint en banc panel. To that extent there might be an additional level of review. In my judgment, however, because I have great faith in the integrity, ability and sense of obligation of my colleagues, I think that this would be a most unlikely occurrence. In other words, the normal course of review would be what it is now—an appeal to the appropriate division, a decision by that division and, only if either the division or the joint en banc panel concluded that a hearing en banc was required, a hearing en banc before either the division, or the joint en banc panel, but not both. Consequently, there would still be only two opportunities for hearing before the court first by a panel and second, but seldom, en banc. I would expect that en banc hearings would be as rare as they are now. Thus I believe that the "parade of horrors" which are set forth in Judge Hufstедler's statement is largely imaginary. Certainly the problems that she imagines are not, in my opinion, either serious or pervasive, as she claims that they are.

The State Bar of California bases its objections in part on a contention that the only administrative problem with which the Ninth Circuit is now confronted has to do with hearings en banc. It refers to the en banc problem as the primary argument for dividing the circuit in the first place. This, with respect, I can only characterize as nonsense. It is easy for those who are not on the inside of the court and do not have to live with the many difficult administrative problems that are created by its size and the extent of the territory over which it has jurisdiction to make such a statement. I will not repeat here what I said in the statement that I filed with your Committee last fall. It fully outlines what those problems are and I think that it makes it clear that the en banc problem is in many ways the least of them, not the greatest.

If my understanding of what the bill would do is correct, then, as I have indicated, I am strongly in favor of it. There are, however, a few small matters to which I would like to call your attention.

First, Section 5 of the bill provides for the appointment of two additional judges for the Northern Division of the Ninth Circuit and five additional judges for the Southern Division of the Ninth Circuit. These figures are not correct. To fill the present vacancy on the court, the President has just nominated a California lawyer who resides in Sacramento to fill the vacancy created by the fact that Judge Merrill has taken senior status. I would assume that that vacancy will soon be filled by that appointment. This would mean that there would then be eight, not seven, judges of this court whose residences at the time of their appointment were within states or districts falling within the jurisdiction of the Northern Division and only one appointment would be necessary to bring the Northern Division up to nine judges. On the other hand, Judge Merrill having taken senior status, and his successor not being from Nevada, there would only be five of the present active judges who would become judges of the Southern Division and it would be necessary to appoint six additional judges to bring that division to its full strength of eleven active judges.

Section 2 of the bill deprives the present members of the court of any right to choose whether they will become members of a particular division. I know of at least one member of our court who objects to the bill solely on the ground that if the court is divided into divisions as the bill contemplates, he would prefer to change his residence so as to be in the division of his choice. I presume that the restriction of Section 2 of the bill is designed to see to it that a reasonable number of the present active judges will become a member of each division, but I find it hard to justify the restriction since it has always been the law that a circuit judge can change his residence within the circuit to any city where the court sits,

I suggest that the ten-day time for certification or petitions for rehearing before the joint en banc panel, which is prescribed in Section 46 of the bill (page 8, line 22), is too short. The mail service being what it is, I would think that the time should be closer to thirty days rather than ten days. I have known it to take a week for mail from San Francisco to reach Los Angeles. Sometimes it takes several days for mail from Arizona to reach Los Angeles. Similarly, it takes a long time for mail from Alaska or Hawaii or Guam to reach San Francisco. Thus counsel may not learn of the decision of the court for several days. Having learned, counsel will need time to prepare a petition and time to submit it to the court.

I suggest that in Section 19 of the bill, at line 3 on page 18, the words "or division" should be inserted after the word "circuit" and, similarly, that at page 19, line 14, the words "or division" should be inserted after the word "circuit."

I suggest that the jurisdiction of the joint en banc panel, as prescribed in Section 25 of the bill, might be redefined. Much of the law of California and much federal law is strictly judge-made. The jurisdiction of the panel is restricted to decisions affecting "the validity, construction, or application of any statute or administrative order, rule, or regulation, state or federal, which affects personal or property rights in the same state." Perhaps this could be revised to read "the validity, construction, or application of any statute, rule of law as announced by the courts, or administrative order, rule, or regulation, state or federal, which affects rights or duties in the same state." I would not limit the jurisdiction to such matters which affect only personal or property rights. Much litigation now affects the actions of administrative bodies within the state of California and some of them at least may not fit neatly in the category of actions affecting personal or property rights.

Finally, I do not favor a suggestion that has been made by some of my colleagues, and that I at one time thought that I favored, as is indicated in the letter that I wrote to your Chairman under date of December 19, 1974. That suggestion is that the jurisdiction of the joint en banc panel should be enlarged to include all alleged conflicts between the two divisions. This would indeed create an additional level of review and would lend support to the "parade of horrors" advanced by Judge Hufstedler, to which I have heretofore referred. I think it would be a mistake to create this additional level of review within the circuit.

I end where I began. I strongly favor the bill. I think that it is of the utmost importance, first, that there be adequate judicial manpower to handle the business of the circuit. We need twenty judges whether the circuit is divided or not. Second, I think it equally important that the circuit be divided. A court of twenty judges will not be a court in the sense in which we have long used that term. It will simply be a collection of judges. A court of nine or a court of eleven, with a lower workload and a smaller geographical jurisdiction, can function in the manner in which a collegiate court is supposed to function. This I regard as of the utmost importance to the administration of justice in the Ninth Circuit.

Two of my colleagues, Judges Koelsch and Browning, have reviewed the foregoing statement and I am authorized by them to state that they are in general agreement with it. Time has prevented my submitting the statement to other members of the court. I do know, however, that the following members of the court are generally in favor of the bill: Judges Ely, Wright, Choy and Goodwin. I understand that Judges Hufstedler, Wallace and Sneed are opposed to the bill. Judge Chambers will speak for himself. I know that two senior judges, Judges Merrill and Kilkenny, also favor the bill.

Senator BURDICK. Senator Cranston is unable to be present, but desires to submit a prepared statement to be made a part of the record at this time.

[The statement of Senator Cranston follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman: Thank you for this opportunity to present to the Subcommittee on Improvements in Judicial Machinery my views on S. 729, a bill to reorganize the fifth and ninth circuits, and amendment no. 132 to that bill.

I endorse without reservation Senator John Tunney's excellent statement on S. 729. Senator Tunney and I have joined to introduce an amendment to the bill changing its treatment of the Ninth Circuit in certain respects.

The Ninth Circuit, which serves nine states, is over-burdened. As a result, federal justice on the appellate level is delayed excessively, and in many instances, effectively denied to parties. Reform is mandatory.

The Subcommittee proposes in S. 729 to redistribute the workload of the Ninth Circuit by splitting California between two independent divisions of the Circuit. In effect, this plan calls for dividing California between two separate and independent federal courts of appeal—California would be the only state so divided.

The major obstacle to reorganizing the Ninth Circuit has been the fact that California accounts for more than two-thirds of all cases filed in the circuit. Our state generates sufficient court business to support a Circuit Court consisting solely of California. Such a circuit would be the third or fourth busiest in the nation!

Proposals to establish California as an independent circuit have not gone far. The multi-state, regional nature of federal judicial circuits, is considered by many to be an overriding consideration in organizing a federal judicial circuit.

But if California is to be part of a multi-state circuit, the problems of over load remain.

The Subcommittee on Improvements in Judicial Machinery has hit upon the expedient of dividing the state in half, much as Solomon proposed for the child claimed by two women.

Dividing the state and its 20 million people will create more conflicts than it will solve. California State Attorney General Evelle Younger has listed six areas in the field of criminal law alone where such conflicts could easily occur. These include prison regulations, state habeas corpus proceedings, probation revocation, post-conviction remedies, federal procedural rules and laws controlling pornography.

It is possible that the State could find itself freeing a prisoner in the North, while the same facts and issues in the South would result in a denial of release. State law enforcement officers could stop the spread of smut in one area of the state, but would be powerless to act in another. State fraud investigators could halt schemes to bilk people in San Francisco, but not in San Diego. These results, I believe, would be intolerable to Californians.

In cases of statewide impact, Mr. Younger points out, such as those arising out of California's billion dollar water project which runs the length of the state, conflicting decisions are a very real possibility. Challenges in Federal Court are likely to be brought against the project or against state agency actions from both the north and south parts of the State, which under the Subcommittee bill, would place these cases in different divisions of the Circuit.

To resolve these conflicts the Subcommittee has proposed a joint en banc panel consisting of four judges from each division and the chief judge. This adds an additional level of review which would exist only for California and the Ninth Circuit—no other state and circuit would be subjected to this extra layer of judicial review. This burden will be particularly great for the California State government which will have to monitor decisions in both divisions and appeal any conflicts which exist to insure that state agencies can apply uniform procedures and orders throughout the entire state.

These are just a few of the obvious inequities that arise from asking California to carry the burden of accommodating the needs of the Ninth Circuit. I don't think that within our federal system it is fair or right to require one state to carry a burden not shared by others.

The problems of the Ninth Circuit can be solved without subjecting any State to unwarranted burdens on its government, people and organized bar.

Senator Tunney and I have sponsored such a solution: one developed by the California State Bar Association and which has come to be called, "The California Plan."

The California Plan for Revision of the Ninth Circuit proposes to keep California intact, joined with her neighbors, and solves the administrative problems of the Circuit by means of a special nine-judge panel which would coordinate and resolve conflicts in decisions within the court. I am convinced that this solution will work and will allow for the growth of our region—if modern methods of court administration also are instituted promptly.

Our federal courts are being run in a manner reminiscent of the Eighteenth and Nineteenth Centuries. Times have changed and the courts must change, too.

The advantages and advances of modern technology and administrative methods—such as computers, instantaneous transmission of judicial decisions via electronic media, and other techniques—have not been utilized as fully as they could be in the Ninth Circuit—and for that matter in courts throughout the land.

The caseload in the Circuit can be reduced by cutting down on the number of cases entering federal courts at the trial level. For example, I have cosponsored legislation decriminalizing marijuana offenses. I am told marijuana and other drug related offenses account for the total time of more than four judges in the District Courts of the Ninth Circuit. Immigration proceedings, which could be handled through administrative processes, account for a large percentage of the business of federal court in San Diego. These reforms also would cut down on the case load of the Ninth Circuit.

Until these remedies have been tried and it is proven that they will not improve administration of justice in the Ninth Circuit—and I doubt this will be the result—I will oppose cutting California in half. If the failures in administration of our court system have brought the Ninth Circuit to the point of collapse, then those faults are in need of correction, not the size of the circuit. Chopping the circuit into smaller pieces won't solve those problems, it merely is an easy way to avoid dealing with modern court reform.

I appreciate the desire of the Subcommittee to achieve a lasting solution to the problem of administration of justice in the Ninth Circuit in a way that will accommodate the potential future growth of our region. Any observer of the work of the Subcommittee and of the Commission on Revision of the Federal Appellate Court System, so ably chaired by Senator Hruska of Nebraska, quickly learns that the answers are not easy and that not all of the cherished customs, old ways of doing business and the finer jurisprudential considerations of federal appellate courts will survive the revision needed for the Ninth Circuit. Some things will have to give way. The question is which ones?

I disagree with the judgment reached in S. 729. It is my view that it is not necessary to divide California to solve the problems of the Ninth Circuit. My view is shared by my colleague, Senator Tunney, by the Attorney General of California and by the California State Bar Association.

The amendment I have cosponsored offers a constructive solution, one which keeps stability and certainty in the law as its main operating features. It is supported by the organized bar of the state and distinguished judges.

I urge the Subcommittee to give careful consideration to the opinion and views of Californians who must live under the results of whatever decision you reach. These concerns cannot be lightly set aside or dismissed as imaginary. They are very real. Those who have had the actual experience of administering and governing in California—a vast and diverse state—conclude that bifurcating California will cause great difficulties in governing the state. As a former State officer, I respect their concerns and share them.

Senator BURDICK. Today, the proponents of the "California Plan" are our principal witnesses. I will now call Mr. Brent Abel, president of the State Bar of California, who is accompanied by Mr. Jordan Dreifus, attorney of Los Angeles.

Gentlemen, you may each proceed to make such initial statements to the subcommittee as you desire. And we welcome you to the committee.

STATEMENT OF BRENT M. ABEL, PRESIDENT, STATE BAR OF CALIFORNIA, ACCOMPANIED BY JORDAN A. DREIFUS, CALIFORNIA STATE BAR COMMITTEE, LOS ANGELES, CALIF.

Mr. ABEL. Thank you, Senator. I am Brent Abel, and Mr. Dreifus is on my left.

[The prepared statement of the State Bar of California follows:]

STATEMENT ON BEHALF OF THE STATE BAR OF CALIFORNIA

In summary, the State Bar of California :

1. opposes S. 729 insofar as it affects the Ninth Circuit ; and
2. supports Amendment No. 132 introduced March 17, 1975, by Senators Alan Cranston and John Tunney.

A. HISTORY OF S. 729

Proposals to reorganize the Fifth and the Ninth Circuits originated with the Commission on Revision of the Federal Court Appellate System in recommendations made by the Commission in its report of December 1973. That Commission recommended a plan of dividing the Ninth Circuit into two new circuits by cutting the existing circuit roughly into halves of nearly equal population and caseload. And in doing so, it would cut the State of California similarly into halves, placing the northern half of the State in one new circuit and the southern half in another new circuit.

Early last session bills were introduced (S. 2988-2990, 93rd Congress) to carry out that plan. Hearings were held on them last fall by this Subcommittee. In testimony received at those hearings and in formal statements submitted prior to and subsequent to the testimony, the State Bar of California, local bar associations in California, the California Attorney General and others stated their firm opposition to any realignment of the Ninth Circuit which would effectively divide California into two appellate jurisdictions for purposes of federal intermediate appellate court review.

We assume this Subcommittee will take notice of such testimony and statements which were received during the 93rd Congress. Therefore, we do not repeat here all that was at that time said and furnished to this Subcommittee on this subject. What was said then, nevertheless, bears re-emphasis. The structure of the federal courts and the federal court appellate system are an integral part of a complex web of federal-state interrelationships which have come into existence to a degree hardly conceived as recently as fifty years ago and which continue to grow. The State of California, as a government, administrative, political and economic entity, has become a close participant with the federal government in all of these areas. The decisions of the Court of Appeals of the Ninth Circuit, and the decisions of the U.S. district courts and various administrative agencies under the precedents made by the Circuit, have a direct operational impact on all sorts of activities, programs, and relationships, governmental and non-governmental, throughout the State of California. The Court of Appeals is effectively the federal appellate court of last resort in many of these cases, for lack of review by the Supreme Court. It would be detrimental to all aspects of government, and to the conduct of ordinary affairs by the people of California, to restructure the appellate system of the Ninth Circuit in a manner which ignored the need to preserve unity of judicial decision and judicial precedent co-extensive with the territory and governmental organization of the State whose people the judicial system is intended to serve.

In December 1974, Senator Burdick circulated a committee print amendment of S. 2990, 93rd Congress, which contained substantial changes with respect to the Ninth Circuit, in an attempt to overcome the serious deficiencies of the original plan respecting California. S. 729, now pending, is substantially the same as that committee print.

We examined that committee print, as did the California Attorney General and others. We concluded that its provisions respecting the Ninth Circuit (which are repeated in S. 729) were undesirable and probably unworkable. In lieu thereof, the California State Bar suggested a simpler solution for the Ninth Circuit, making use of and building upon one of the substantial innovations introduced by Senator Burdick in his committee print.

The Ninth Circuit provisions of S. 729, like those of the preceding committee print, appear to be self-contradictory. On the one hand, S. 729 includes a new provision to recognize (as it must in view of the evidence and comments received last year from California witnesses) the necessity that there be a single tribunal at the Court of Appeals level to decide conflicts of decision respecting the law applied by the federal courts in all of California. On the other hand, S. 729 would divide California into what are virtually two separate circuits, in the same configuration as in the original plan of the Commission on Revision, except for the semantic of naming each fragment a "division" instead of a "circuit". In attempting to achieve these incompatible objectives, S. 729 would create court arrangements in the Ninth Circuit which would be unduly complex but which also would only operate to preserve uniformity of law applied in California at the price of administrative inefficiency, uncertainty and delay for litigants, attorneys and the judicial system itself.

Essentially, S. 729 would divide the Ninth Circuit and California into a "northern division" and a "southern division". It would redefine "circuit" in other statutes and provisions of law so that each such "division" would be substantially a judicial circuit in all respects, including, for example, the power of each "division" to sit in-banc, the same as any other court of appeals in-banc. The bill increases the total number of judges in the Ninth Circuit so that the new northern division would have nine judges and the new southern division, eleven, for a total of twenty. In the effort to meet the needs of California, the bill would superimpose over the two divisions a third entity, a special tribunal known as the "joint in-banc panel". This joint in-banc panel would be composed of the nine most senior judges, drawn five from one division and four from the other. The joint in-banc panel would have jurisdiction over the two divisions in cases arising in California and requiring resolution of a conflict of law applied in the federal courts in California. The joint in-banc panel would no doubt have a substantial work load because California comprises about two-thirds of the population of the Ninth Circuit and the California caseload comprises about two-thirds of the caseload of the Ninth Circuit. The jurisdiction of the joint in-banc panel, of course, would not be limited to rarely arising constitutional issues, but must include the resolution of all conflicts of decision arising in federal courts in California in order to meet the need for which it is intended.

B. WHY WE OPPOSE S. 729 IN ITS PRESENT FORM

As we see it, some of the problems that would ensue in the Ninth Circuit under S. 729 are these:

1. The joint in-banc panel (in Section 11 of S. 729, pages 7-9 of the Bill) has review jurisdiction over each division of conflicts of decision in cases arising in or involving law applied in California, which are two-thirds of all the cases in the circuit. This must mean that after judgment in the district court (or administrative agency action reviewable in a court of appeals), there will be review first by a three-judge panel of the court of appeals; next, if granted, by a hearing or rehearing in-banc by the division; and next, if granted, a hearing by the joint in-banc panel; then (if the litigants and lawyers are not exhausted) review by the U.S. Supreme Court. This multiplication of appellate hearings into three separate stages at the intermediate appellate level cannot but result in additional delay and expense to litigants and a duplication of workload for those judges who are members of the joint in-banc panel who would have considered the case at the division in-banc stage and again as a member of the joint in-banc panel. Also, there would be cases in which a petition or suggestion for hearing in-banc is refused by the division in-banc but in which a hearing is thereafter granted by the joint in-banc panel, which is composed of a different membership and may feel a responsibility for a different view of the law. Litigants, and particularly the lawyers advising them, will naturally feel obliged to exhaust all three tiers of the appellate structure. Additional delay and expense in appellate litigation would appear to be the result.

2. The consequence of the appellate structure just described is that litigants, lawyers and judges in the Ninth Circuit would be subject to two possibly diverging bodies of jurisprudence, namely, the law of the southern division and the law of the northern division.

Furthermore, a litigant in Arizona, or in any state of the Circuit other than California, might face the added complication of possible conflict between his or her division (in a case not subject to joint in-banc panel revision) and a joint in-banc panel decision. This apparently can occur under S. 729 because

the divisional decision is not subject to joint in-banc review if the case is from a state other than California and does not involve any law applied in California.

3. The splitting of California into divisions, which are virtually separate circuits except for the review by the joint in-banc panel, is likely to produce confusion, delay, and procedural disagreements in resolving sensitive types of litigation in which the State of California or its agencies are parties or in which their programs are directly in issue. There are numerous statutes (many of them listed in the statement of the California Attorney General submitted last fall to this Subcommittee) which provide for court of appeals review of federal administrative action concerning a state or state agency in carrying out federal programs or regulated or subsidized activities. These statutes typically provide that jurisdiction and venue for review shall be in that circuit which "embraces" the state concerned or in which the state is "located", or in the "appropriate" circuit, etc. More of these statutes are enacted all the time. Typical is the recent enactment of Section 17 of the Deepwater Port Act, P.L. 93-627, January 3, 1975, which provides for review in the circuit within which the nearest "adjacent coastal state" is located. In which "division" is the State of California located for such purposes? S. 729 does not say, presumably leaving it to be settled by litigation. If the answer is that the proceeding can be brought in *either* division, it would be an invitation to duplicate litigation and forum shopping, at the division level, in a kind of litigation that is particularly susceptible to that problem and in which even temporary conflict of decision would be injurious to the public interest. If S. 729 were enacted, the probable tendency in this type of litigation would be to bypass the divisional in-banc stage and immediately seek review by the joint in-banc panel, to avoid the time and efforts of litigants and judges at the division in-banc stage when only the joint in-banc panel could speak with an authoritative voice.

4. As already noted, the Ninth Circuit will have not two, but effectively three, federal courts of last resort subject to review by the Supreme Court under S. 729, namely, the joint in-banc panel in cases arising in California and each division in other cases. With effectively three new "circuits" in place of the present one, each would have the power to disagree with the others, subject only to resolution by the Supreme Court. This would aggravate further the Supreme Court's already heavy caseload.

5. We also question some of the technical provisions of S. 729 respecting the jurisdiction and procedure of the proposed joint in-banc panel. These appear to restrict access to that panel unduly. The panel might be prevented from fulfilling the basic purposes it is intended to serve. Unnecessary technical threshold controversies are likely as to the extent of the jurisdiction of the joint in-banc panel. The jurisdiction of the joint panel under S. 729 is defined in a proposed amendment of 28 U.S.C. §12991 (page 23 of the Bill), which provides that the joint panel would have jurisdiction to hear a case in which there is a conflict between the division—

"... affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same state."

This is broader than the analogous provision of S. 2990, 93rd Congress, which was limited to cases of claimed invalidity (unconstitutionality) of laws, rules, etc.

But even the proposed Section 1291 language is not sufficiently broad. It would in practice lead to unnecessary litigation over what are "personal or property rights" and whether "rule" includes case law. A proper description of what must be covered would simply say that the joint panel must hear and decide conflicts of decision respecting the law applied in the divided state, with "law" defined to include case law, constitutions, statutes, regulations, rules and orders of any kinds, state or federal.

6. The jurisdiction of the joint in-banc panel seems (proposed U.S.C. §46(d) (2), at pages 8-9 of the Bill) to depend on the filing of a certification or a petition "... within ten days after service of the notice of entry of judgment by the division." First, having a jurisdictional period begin from the date or time of *service* of a notice, rather than the date of judgment or of entry of judgment (regardless of when service is made) is a concept foreign to federal trial, as well as appellate, procedure. It would be bound to breed threshold jurisdictional litigation. Second, ten days' time is totally inadequate, given the current realities of U.S. mail service and the geographical size of and dis-

tances in the distances in the Ninth Circuit (and in each division). Under Federal Rules of Appellate Procedure, Rules 25 and 40, a petition for or suggestion of a hearing or rehearing in-banc must be filed within fourteen days after entry of judgment. Even this provision has been severely criticized by attorneys in California as too short to permit proper consideration of and preparation and filing of such papers. This is so, particularly for attorneys who are at a distance from the clerk's office or in other states. Even in the same city, substantial delays in delivery by mail are commonplace. The comparable provision in Rule 58 of the U.S. Supreme Court Rules provides twenty-five days in which to file a petition for rehearing. Under the former Ninth Circuit Rule 23 (1964 ed., prior to the adoption of the Federal Rules of Appellate Procedure) the time so to petition was thirty days. When too short time limits are imposed, litigants are forced to incur the extraordinary expense of accelerated legal work and of such measures as employing commercial air express or courier service to deliver papers which should otherwise go as ordinary mail. The extremely short ten-day period may discourage meritorious petitions which might otherwise be filed, and may likewise encourage the filing of unnecessary petitions simply to protect the time pending an opportunity for mature consideration.

7. S. 729 provides that the joint in-banc panel would be selected by straight seniority from among the twenty circuit judges of both divisions of the Ninth Circuit. As is well known, this is a highly controversial issue among both lawyers and judges. Many attorneys have expressed opposition to seniority as the basis of composition of the joint in-banc panel under this or any other proposal for any form of in-banc panel. Chief Judge Chambers of the Ninth Circuit has stated the opinion that under any form of in-banc panel arrangement, judges eligible for retirement should not be eligible for the in-banc panel. The provision in S. 729 for selection and tenure (at least as to eight members other than the Chief Judge) on the basis of seniority without modification or provision for alternative options is undesirable. It should not be adopted without further study of alternatives.

8. We doubt that S. 729 will lead to economies in operations of the courts and their offices, staffs, facilities, etc. Two divisions, with two Clerk's offices, will almost certainly result in greater expenditures for more personnel, space and facilities, than the maintenance of a single office. What is more, the joint in-banc panel apparently would have its own Clerk under proposed 28 U.S.C. §46(d) (2) of the Bill.

C. DESIRABLE FEATURES OF S. 729

Notwithstanding what we conceive to be the defects in S. 729, it contains two innovations which we believe are desirable.

First, it recognizes the concept that an in-banc panel of judges, of less than the whole number of circuit judges, can be empowered to act as the court in-banc and thereby establish the law of the circuit. Recognition of this concept provides the mechanism, further discussed below, for solving the problems of the Ninth Circuit.

Second, S. 729 contains a provision which would facilitate achieving uniformity of local practice and procedure in a multi-district state such as California. We think such a provision has merit independent of the other provisions of S. 729.

D. HISTORY OF AMENDMENT NO. 132

In December 1974, and January 1975, the State Bar of California, on the recommendation of its Committee on Federal Courts, considered and rejected the Ninth Circuit provisions now contained in S. 729 and proposed instead a much simpler arrangement based on maintaining the present structure and alignment of the Circuit, but providing that in-banc functions should be fulfilled by an in-banc panel similar to the joint in-banc panel proposed in S. 729. Indeed, the only significant difference between the joint in-banc panel in S. 729 and the in-banc panel in the California proposal would be that under the California proposal, the Ninth Circuit in-banc panel would have jurisdiction of *all* cases. Under S. 729, the joint in-banc panel would have jurisdiction *only* of the two-thirds of the cases which arise in California. Thus, the California proposal builds upon and makes use of the very useful and innovative provision which, as mentioned above, originated in Senator Burdick's committee print and which is in S. 729.

The California State Bar drafted a bill along these lines. Between December 1974, and February 1975, the California State Bar, the California Attorney General, and others made their positions and their proposal known in detail to Senators Cranston and Tunney and to Senator Burdick and his staff.

On February 4, 1975, Senator Cranston and Senator Tunney stated their views in a letter to Senator Burdick, which concurred with our position.

We, therefore, strongly support Amendment No. 132, which embodies the proposal of the State Bar of California, as introduced by Senator Cranston and Senator Tunney, in lieu of the Ninth Circuit provisions of S. 729.

The Amendment would replace the parts of S. 729 which affect the Ninth Circuit but leave unaffected the parts which affect the Fifth Circuit. In place of the Ninth Circuit provisions of S. 729, the Amendment would provide (as would S. 729) twenty judges for the Ninth Circuit and would provide for the performance of all in-banc functions of the circuit by an in-banc panel of nine circuit judges. The Amendment contains conforming amendments to the Federal Rules of Appellate Procedure which are necessary to accommodate the Ninth Circuit in-banc procedure and to avoid inconsistency between those Rules and the Amendment as to matters which properly belong in those Rules rather than in a statute. The Amendment also makes language changes in the portion of S. 729 relating to uniformity of local practice and procedure. Finally, the Amendment contains appropriate transition and effective date provisions respecting the Ninth Circuit.

Further details of the Amendment are as follows:

1. Sections 1, 2, 3, 4 and 6 of S. 729 would be amended to eliminate references to the Ninth Circuit, but would remain unaffected concerning the Fifth Circuit. Sections 5 and 9 of S. 729 would be amended to provide for the additional seven judgeships in the Ninth Circuit and the appointment of the additional judges, but eliminating references to divisions.

2. Section 11 of S. 729, which would amend 28 U.S.C. §46, would be amended to delete the proposed §46(d) and in lieu thereof substitute a new subsection (d). The substituted subsection would provide that in the Ninth Circuit there shall be a nine-judge in-banc panel which shall exercise the in-banc powers of the court and would provide other details as to method of selection of the in-banc panel, its composition, procedure, etc. Subsections (a), (b), (c) and (e) of 28 U.S.C. §46, as they would be amended by Section 11 of the Bill, would be further amended to add exceptive cross-references to the new proposed subsection (d).

3. Section 19 of S. 729, insofar as it would amend 28 U.S.C. §332(d) by adding a new third sentence to that subsection, would be amended to delete the references to divisions and otherwise modify the provisions relating to uniformity of local rules.

4. Section 23 of S. 729, insofar as it would amend 28 U.S.C. §1294, would be amended to delete the reference to "Northern Division" from §1294(4).

5. Section 24 of S. 729 which would amend 28 U.S.C. §1254 and Section 25 which would amend 28 U.S.C. §1291 would be deleted as unnecessary.

6. In conjunction with the in-banc panel procedure, the Amendment would amend Federal Rules of Appellate Procedure, Rule 35, which governs Court of Appeals in-banc procedure. This is necessary in order to carry out the intent of the Amendment and in order to avoid any inconsistency between the provisions of the Rule and the new statutory provisions for the Ninth Circuit in-banc panel. The amendment of the Appellate Rules is made subject hereafter to the powers of the regular rule-making procedure under 28 U.S.C. §2072 for any further amendment or modification deemed advisable.

The Amendment also contains certain transition and effective date provisions respecting only the Ninth Circuit, which generally make the amendments effective January 1, 1976, the same date as is provided for the Fifth Circuit provisions of S. 729. The transition provisions provided for the Ninth Circuit have been arranged to determine with as much clarity as possible the applicability of the new provisions in different situations in order to avoid uncertainty, ambiguity and litigation over the technicalities of the transition.

The Amendment provides that a quorum is to be seven of the nine judges on the in-banc panel. This is a relatively high number, compared, for example, with six out of nine for the Supreme Court, 28 U.S.C. §1, and compared with only a simple majority required under present Court of Appeals in-banc procedure. The relatively high quorum number is intended to assure stability in the composition of the panel.

The Amendment also provides that a majority of the membership of the in-banc panel may decide to hear or rehear a case in-banc (see the proposed amendment of FRAP Rule 35(a)).

The Amendment retains the provision of S. 729 for improvement of local practice and procedure but with some modifications. Such a provision is necessary and salutary whether or not the State of California is divided into separate divisions. It was pointed out in the State Bar of California statement submitted last year that division of California into separate circuits would have destroyed any hope of obtaining relative uniformity of local practice and procedure in district courts. At present, there is a high degree of uniformity of practice and procedure among the various superior courts of the counties of the State, possibly more so than between and among the four federal districts in the State. S. 729 includes an amendment of 28 U.S.C. §332(d) which would create a joint committee of circuit and district judges for the purpose of recommending improvement and uniformity in local rules. The Amendment modifies this provision to make it more flexible and permissive rather than mandatory and to make it clear that cooperation with bar associations and others is authorized and encouraged.

Local practice and procedures cover mundane and routine matters. But these are matters which substantially affect the every-day conduct of practice and indirectly the economics of the practice and the cost to litigants.

We think it appropriate to respond to certain criticisms that have been directed against the principle of committing in-banc powers to less than all of the judges of the circuit. That criticism (see Congressional Record of February 18, 1975, at page 8—1968) is to the effect that "limiting the in-banc function in all cases to but nine judges" is not conducive to harmony in a court containing more than nine, and would have the effect of creating "first and second class" circuit judges.

The criticism stated is inconsistent with the terms of S. 729 itself. The function envisaged for the joint in-banc panel under S. 729 would be identical to that of the in-banc panel under the Tunney-Cranston Amendment except for the fact that the Amendment would apply the in-banc panel jurisdiction to *all* Ninth Circuit cases instead of only to a portion of them. The joint in-banc panel under S. 729 composed of nine judges could decide, in a five to four decision, to overrule or reverse a decision of, for example, the proposed southern division of the Ninth Circuit, which would have eleven judges sitting in-banc. Moreover, we are informed that the Commission on Revision of the Federal Court Appellate System now has under consideration and may issue a report in favor of a new proposal which would provide for similar in-banc panel-type jurisdiction and procedure in any circuit when the number of circuit judges in the circuit exceeds nine.

Empowering an in-banc panel to make the law for the whole membership of the circuit is no different from the function exercised by any appellate tribunal over any group of lower tribunals. Such a division of authority and function is found in most judicial systems and in most forms of governmental and private organization. Of necessity, this division of functions means that some small body of judges must be the ultimate arbiters of the law at the head of the structure and that the lower judges and courts are bound to follow the rules thus made. We know of no judicial system or system of government in which every judge or officer has absolute equality of power with every other.

The principle which appears to have been assumed previously by the Commission on Revision of the Federal Court Appellate System seems to have been that every circuit judge should participate in every in-banc decision, no matter how large any circuit might become. This principle could be carried to an absurd extreme. No one would suggest, for example, that the one hundred or so circuit judges of all the circuits ought to get together and by majority vote of their whole membership decide conflicts of law between the several circuits. Absurd as that may sound, there is no logical difference between such a hypothetical case and the proposition that no matter how large a circuit becomes, only the total membership can sit and act in-banc.

In short, we believe that nine circuit judges selected by an appropriate process with relative stability and permanence of position and similar in functions to the joint in-banc panel proposed in S. 729 would be a suitable tribunal to make and settle the law of the circuit. With such a review jurisdiction explicitly provided by statute, we do not believe that there would result the "disharmony" feared by critics.

A question of particular importance is the method of selecting the judges who are to sit with in-banc powers. The Amendment provides that the membership of the in-banc panel is to be determined according to seniority but empowers the judicial council of the circuit (composed of all the circuit judges) by a majority to adopt an alternative method of its choice. In considering the provisions proposed, seniority versus other methods of selection was a predominant subject of discussion. Strict seniority as a basis was generally considered undesirable. The provision of seniority together with power in the judicial council of the circuit to choose another system is intended to give flexibility and to avoid the collateral issues and complexities involved in attempting to detail in a statute some method of selection other than seniority.

We wish to make clear that we do not oppose any feasible and generally acceptable alternative to seniority as a method of selection or tenure for the membership of an in-banc panel. Enacting the Amendment in its present form would permit on-going study of the subject, with seniority to prevail in the meantime. The subject might, for example, have the attention of the Commission on Revision of the Federal Court Appellate System. We suggest exploration and evaluation of a number of possible alternative methods, such as the following, most of which could be combined with others:

(a) Selection by seniority, but for a limited tenure on the panel for a stated term of years. The terms could be staggered so as to provide a continuity of membership on the panel; replacements by other circuit judges could either be on the further basis of seniority or by random selection from the remaining circuit judges, etc.

(b) Staggered seniority, that is, selection of every other judge in order of precedence.

(c) Selection by some other method, such as a random method, but for stated terms of years, with replacement at the end of terms limited to the pool of circuit judges who have not served, etc.

(d) Appointment by higher authority (for example, by the Chief Justice of the United States), either for indefinite tenure or for terms of years.

(e) An age limit, or retirement eligibility limit (as suggested by Chief Judge Chambers) might be a feature of one or more of the foregoing.

A Los Angeles County Bar Association subcommittee has suggested a method of random selection of the initial panel membership for staggered terms of years, with replacement of members upon the expiration of terms, also at random but drawn only from the remaining number of judges who have not served on the panel at all or for a stated period of time.

We believe the fundamental concern of many is that an in-banc panel should have a stable membership, but that the membership should not be exclusively judges who are the oldest in seniority.

The most important feature of the Tunney-Cranston Amendment is that it would in no way change any of the procedural or structural characteristics of the court with which all lawyers in the entire circuit are now familiar. It requires no drastic change of procedure or the addition of a whole new set of rules and concepts to be added to the sufficiently complicated nature of existing appellate procedure.

In conclusion, the State Bar of California urges this Subcommittee to reject the Ninth Circuit provisions contained in S. 729, and in lieu thereof, substitute the provisions contained in the Amendment introduced by Senator Cranston and Senator Tunney.

Dated: May 16, 1975.

Respectfully submitted,

BRENT M. ABEL,
President, State Bar of California.

MR. ABEL. Let me open by stressing my appreciation to the chairman and to Mr. Westphal, counsel, for the opportunity for a very thorough exchange of views and for the constructive approach which the committee has taken and the receptivity to our correspondence, if not to our ideas.

I have asked Mr. Dreifus to be with me on the premise that there may be aspects of the matter where his expertise will provide better answers than mine. But let me begin by adding to the record an

editorial from the Los Angeles Times of May 6, and an editorial from the Sacramento Bee of April 28, both of which generally support our position.

Senator BURDICK. Without objection, they will be received.

[NOTE.—The editorials mentioned appear as appendixes to Senator Tunney's prepared statement, *supra*.]

Mr. ABEL. I think just briefly to review where we stand, I would start by pointing out that all agree that the ninth circuit needs 20 judges. And the question is, having arrived at that conclusion, which I think is indisputable, where do we go from there?

S. 729 would follow the route of creating two divisions within the circuit, the ninth circuit. The Tunney-Cranston amendment, which I will call the California amendment, would deal with what seemed to us to be the principal problem with considerably greater simplicity.

Now, essentially the problem is one of managing a 20-judge circuit, and those who think that a 20-judge circuit is unmanageable, I think, place an excessive importance on what has come to be called collegiality of the court.

I think in point of fact what we must consider in looking at this whole subject is the public interest, the desirability of certainty in the law, of a minimum of procedural problems and see how each of these two plans—that is, S. 729 on the one hand and the Tunney-Cranston amendment on the other—stand up against that very paramount consideration of what is in the public interest.

The California proposal, the California amendment would simply allow the en banc functions of the court and powers of the court in the ninth circuit to be discharged by a panel of nine judges. There are a number of different ways in which that panel could be selected. I think we get to that at the second stage of the discussion rather than at the first.

The text of S. 729 on the other hand would create two divisions within the circuit, and there we see a great many difficulties from a practical standpoint, as well as difficulties from the standpoint of certainty in the law and the public interest to which I have referred.

Now, essentially the basic objection to the text of S. 729 is the creation of what seems to us to be a four-level decisionmaking process within the circuit. First at the district court, then to a three-judge panel of the court of appeals, then to an en banc panel or an en banc treatment within the division, and finally the joint en banc panel overreaching at part of, but not all of, the decisions of the en banc panels of the two divisions.

Now, we think that, that is, for a number of reasons, a cumbersome and unnecessary resolution of the main problem. The conclusion essentially is forced on us by the nature and the extent to which Federal law and State law have become interrelated in the last 35 years, and the pattern and the direction which legislation is taking today in the Congress indicates that that interrelation will become greater rather than less.

One threshold question has to do with where the caseload in the ninth circuit is headed. I think in our view one has difficulty in foreseeing what the direction of the caseload will be. We know approximately what it is today. Whether the disappearance of certain kinds

of cases from the calendar in the ninth circuit, particularly cases involving Selective Service violations, will be offset completely or not by other kinds of litigation, which increase the number of filings; these are things which we cannot accurately foresee. Nor can we accurately foresee the trend of population growth in the ninth circuit, except to observe that the curve has been flattening out. And to the extent that population growth affects caseload, one must conclude that the caseload will be flattening out.

So that bearing in mind the uncertainties in the caseload picture, we think one should approach the problem of the California and ninth circuit situation on the assumption that the caseload will not increase as dramatically in the future as it has in the recent past, and that one may prudently plan on an arrangement for the ninth circuit which contemplates a rather limited growth in caseload in the early future.

Now, I say that because if one designs a plan in which two divisions are created on the assumption that the caseload will increase dramatically in the future, and it does not, in fact, do so, we then will have created a set of machinery which is unnecessarily cumbersome in the interest of planning for something that does not occur. On the other hand, if we follow the route of the Tunney-Cranston, the California amendment, and if the caseload does increase dramatically a second step could always be taken later on to go to a two-division concept.

I take it that at this point the only two alternatives the subcommittee is considering are the two which I have described; that is, the route of S. 729 and the route of the California amendment. That is, I take it that the original proposal which came out of the Commission for splitting the ninth circuit is not one of the alternatives which the subcommittee is now considering. Am I correct in that, Senator?

Senator BURDICK. That is correct. Well, we are considering everything, but our principal approach now is S. 729.

Mr. ABEL. Yes. Now, those are the general observations. There are a number of specifics. I think, though, we would only get to those if we cross the bridge of determining which of these routes are going to be followed.

Now, if S. 729 is the route, then we have some mechanical questions within the text created by the numerous statutes referred to, not listed but referred to in my statement wherein the jurisdiction of the court of appeals is laid in the circuit which "embraces" the State concerned. And if you have two divisions, some kind of further statutory amendment would be necessary in order to bring those within, to clarify the matter within that framework.

There are others. There are other points of clarification. But I would prefer not to get into those until the questions are asked about them, because our main point, on which we, after very thorough consideration by our committee and our board of Governors, our main point on which we are quite firm is that the main problems of this 20-judge court can be most desirably and most simply dealt with by the procedure of allowing an en banc treatment by a panel of nine judges to be selected in ways which are still open, in our view, rather than by going to a two-division arrangement with two en banc panels

and a joint en banc panel, and the consequent proliferation of bureaucracy inherent in establishing instead of the present single clerk's office, at least two and perhaps three clerk's offices. One for each division and one for the joint en banc panel.

I think as far as I am concerned I am more interested in pausing there to hear what questions there may be in the minds of the chairman and/or counsel in order to focus on those issues which are of the greatest interest to the subcommittee. So, I would rest at that point. I would think what I would suggest to the subcommittee is that initially we talk about this threshold question of which fork in the road is now to be taken. And having discussed the merits, pro and con of that, that then we focus on the details of each. I wonder if that would be an acceptable way to proceed?

Senator BURDICK. Mr. Dreifus, do you have anything to add before we open this to questions?

Mr. DREIFUS. Senator, I would believe that I could best serve the subcommittee by responding to questions. I believe Mr. Abel has adequately stated our case.

Senator BURDICK. Very fine. I have a few questions and I believe the staff has a few questions.

Mr. ABEL. Yes.

Senator BURDICK. Mr. Abel, you mention the fact that you want the court to be more efficient, and you think that the plan of the Tunney and Cranston amendment would bring you up to more efficiency. If you have 20 judges and keep the same circuit, the same geographical boundaries and the same everything except you change the en banc from 20 to 9, that is the essence of your proposal, is it not?

Mr. ABEL. That is right.

Senator BURDICK. In 1971, before this situation really became boiling and we had all of the controversy, the Federal Judicial Center sent a questionnaire to all of the Federal judges of the United States. Of the judges 241 responded to the questionnaire, and two of the questions that were asked were as follows:

Assuming a circuit reorganization is undertaken, what, in your opinion, should be the optimum number of judges per circuit court?

And the next question that was asked:

Since it would be difficult to create the required number of circuits so that each one has precisely the optimum number of judges, what would be the maximum and the minimum number of judges per circuit?

As I say, 241 judges responded to the questionnaire. They show that when the appellate judges were considered, almost two-thirds felt that nine was the preferred number of judges. However, in response to the second question as to what is the maximum court size, the Federal Judicial Center reported responses as follows: While 41 percent favored 9 as a maximum court size, a sizable number of judges felt that the court could contain 11, 12, or even 15 judges and still function. It is perhaps significant that no judge thought a court of more than 15 judges would be acceptable.

On the other side of the coin, many judges felt that five was the minimum size for an appellate court. However, a significant number of judges suggested three, six, and seven as the minimum size of the court.

Now, Mr. Abel, that is the unanimous opinion of the 241 judges that responded, that there should not be an appellate court of over 15. Do you not think that the judges' opinions on the efficiency of the court and how it was run would have some weight?

Mr. ABEL. Some weight, I would say, though, Senator, that, as in every other form of human endeavor these days, a degree of flexibility and adjustability and adaptability has to be found. I think what is in the opinion of the judges the optimum method of operating the court is only one part of the mix that goes into determining what is best from the standpoint of the public interest. I think judges, and I say this with all due courtesy to my many friends on the bench, tend to see things as they are, to like things as they are, to be reluctant to change their method. And I can perfectly well see as a personal matter it is nicer to work with a group of nine people than it is with a group of 20.

But I do not think that answers the basic question, the basic question being how do we establish a method which has the greatest likelihood of producing certainty in the law. I do not want to overuse the word efficiency, because justice is not always efficient. But, it strikes a reasonable balance between efficiency and the kind of justice to which this country is entitled. So I say that what the judges think about the internal management of their court is only one part of the answer to this question, and not the final one by a long shot.

Senator BURDICK. No; of course it is not the final answer. But it seems to me the men who work in the shop, and are the judges, know when they can do the best job and are most efficient. As I say, the estimates ranged from 3 to 15. None were over 15, and that was the unanimous feeling of the entire response.

Mr. ABEL. Well, let me point out I think within that questionnaire there was no alternate proposed of how they would feel if, having expressed that opinion on the management of the courts as they then existed, whether the answer would be different if the en banc procedures of the court were entrusted to less than the whole number of judges on the circuit. I think that answer might have been different had they been asked if the en banc functions of the court are entrusted to less than all of the judges, would your answer be the same.

Senator BURDICK. I think you are absolutely right, and I think if that en banc situation were presented to them your case would be even weaker yet, because you are having an en banc with 9 judges, which is a minority of 20, and you do not even have a majority input in a 9-member en banc.

Mr. ABEL. Well, of course, there are still many contacts between judges, and I think we must look plainly at the fact that in the Ninth Circuit, as I assume in other circuits, the present makeup of the circuit judges is only a small number of those judges within the circuit who take part in the appellate process because of the calling in of district court judges from all over the circuit.

Also, of course, you get to a balancing of interests here on the question of what further step you have to take if you are going to make a division, go into a division of judges into nine-judge groups, that question being one of whether dividing a State into two divisions, for example, is too heavy a price to pay for that higher degree of cooperation and personal contact that you get from the

nine-judge circuit. There is a balancing of interests throughout this course.

Senator BURDICK. Now, as I say, the optimum number the judges recommended on this question was 15, and you say you can run California with 20. And assuming that business does increase, population increases, would you say then that you could run the ninth circuit with 25, with 27, with 29? Do you have any limit? Do you have any limit at which the court can operate efficiently?

Mr. ABEL. I think there is a limit. I would hate to suggest an arbitrary one. I think it is a number larger than 20. I think the public interest is what prevails here. That is, judges I think are able, should be willing and probably in due course will be willing, and are willing now, to adjust their personal preferences as to the size of the group in order to achieve what seems to me the more important objective, which is certainly in the law, a minimum proliferation of appellate stages in order to arrive at the final decision, and uniformity in the law.

Now, I think one must shape the optimum size to conform to that more important objective.

Senator BURDICK. Well, we have reached one happy accommodation. There is a limit?

Mr. ABEL. Yes; there is a limit. Mr. Dreifus has a response.

Mr. DREIFUS. If I may add to Mr. Abel's comments, the crucial question is that of the institutional unity of the law applied in a States versus the institutional unity of what the judges themselves would feel would be their optimum size.

And I would like to also point out that in California we have an intermediate appellate court system divided into I believe five districts in the State. The second district, District Court of Appeals, has 20 judges who sit in 3 judge panels, and they operate with efficiency and without any difficulty.

There is one thing they do not do, they do not sit en banc.

Senator BURDICK. Would you repeat that, would you read that back to me? I missed that.

[Whereupon, reporter read back the witness' prior response.]

Mr. DREIFUS. If I may clarify the answer, Senator, I was referring to the California Court of Appeals for the second district based in Los Angeles.

Senator BURDICK. Well, I can see a possibility, gentlemen, when you have an en banc of 9, which is a minority of 20, I can see the possibility of having only one point of view presented en banc. It might not be the agreement of the other 11, and what are you going to do about that one?

Mr. ABEL. I think that one can be dealt with by the method of selecting the judges en banc, and I personally would favor some form of rotation that takes the assignment to sit en banc out of seniority as the sole measure, something of the sort that is suggested, was suggested by Judge Hufstедler in rotating the membership on 6-month intervals, something of that sort.

Senator BURDICK. I understand that. But the point is how do you rotate points of view and philosophy, and in this rotation and complication you could very well have the 9 having one point of view

and the 11 having another, which the 9 would have the minority point of view.

Mr. ABEL. But I think actually that makes a point for uniformity, Senator, in the sense that with the change in makeup of the panel I think you would find that the institutional unity of the court is likely to be greater rather than less, because in due course everyone on the circuit would have been within a relatively short period sitting in the en banc role.

Senator BURDICK. But my point still is that on one drawing, whether it is the Hufstedler plan or whatever plan it is, on the one drawing you could have a minority point of view in those judges.

Mr. ABEL. Yes; this is possible. But how serious a vice is that? I think that is my next question. I am not sure it is.

Senator BURDICK. You do not have the feeling and the expression of the circuit because you do not have the input from all 20. You cannot. Can you say that that is the law of the circuit because nine of them decide on a minority view?

Mr. ABEL. If the nine happens to be a minority view at the time, 1 year later, or 2 years later, it will no longer be.

Senator BURDICK. And then where is the stability?

Mr. ABEL. I think the stability comes from the fact that over time that process simply compels every judge in the circuit to reexamine his viewpoint, and his or her viewpoint, and come to a greater degree of intellectual consanguinity, if you will, than exists today where essentially the en banc procedure does not really give an opportunity for full, equal participation by all of the judges in the circuit anyway.

Senator BURDICK. I do not understand that. They are all invited. What do you mean? They are all a part of the en banc, and what do you mean do not have any input?

Mr. ABEL. They sit too rarely en banc to have that sort of input. And furthermore, I am not sure that each judge has an equal voice today.

Senator BURDICK. Do you know that as a fact?

Mr. ABEL. No; I do not think I can prove it as a fact.

Mr. DREIFUS. Senator, I would like to add to Mr. Abel's thoughts on this. Stability in the composition of a court goes hand in hand with the Anglo-American jurisprudence principle that courts should follow their prior precedents for stability in the law.

Now, any institution, no matter how you organize it is going to be relatively stable or relatively unstable. One could have ultimate stability if one could have a court of unchanging composition forever, which is absolutely bound to follow its prior precedent.

We have relative instability even in the U.S. Supreme Court because over time its members retire or are replaced, or the court simply changes its mind and decides that it has reason enough to overrule or depart from a prior decision. So we have relative values of stability and instability.

The law has got to have some instability. Otherwise it would never change, and a nine-judge en banc panel in one circuit is a sufficient membership to assure a relative degree of stability that a circuit or a State can get along with.

Senator BURDICK. Are you trying to tell me that a nine-judge en banc will give you more stability than a 20 court en banc? Are you telling me that, really?

Mr. DREIFUS. Senator, yes. If you had no means of sitting en banc at all, if you had 20 judges that sat in three-judge panels with solely the obligation of attempting to follow what other panels are reported to have done in cases you will get relative stability. There are a lot of court systems with—in fact, this is one of the problems in our Federal court system now, the inability of the Supreme Court to adequately assure unity. But, every three-judge panel would attempt to follow its obligation of what a prior panel has done—observing what a prior panel has done, following the rules thereby made. But, you must have somebody at the head of the organization to make the law and resolve the conflicts where they do arise.

And a nine-judge panel that has a rotating membership admittedly is less stable than a nine-judge panel appointed for life to serve as the judges who will have the final decisionmaking power. But various other values are at stake. Members of the bar are universally opposed to such a permanency and the problems that it would give rise to, and would prefer rotating membership in some form.

Senator BURDICK. Judge Brown of the fifth circuit has described several other problems to us, and he and other judges mentioned the great difficulty that each judge had in trying to read and keep abreast of all of the opinions written by every one of the other 14 judges. Under your California plan, it is not true that each of the judges would have to keep abreast of each opinion written by 19 other judges?

Mr. ABEL. The answer to that is yes. And I think the further answer is that this is not an extraordinary or an unbearable or an intolerable burden.

Senator BURDICK. Another problem mentioned by Judge Brown was the logistical problem of communicating with 15 judges scattered over a 6-State area extending from Texas to Florida. In addition to communications was the problem involved in assembling 15 judges at the headquarters of the court in order to form an en banc court or perform judicial council functions. He also testified that despite such difficulties, it is desirable that all of the judges of the circuit be in the same city at the same time and at the same place, and this helped to promote collegiality and the feeling of unity among the members of the court. Do you have any feeling about how the ninth circuit is going to accomplish this same purpose if it has 20 judges scattered over a nine-State area extending from the mid-Pacific to the Mississippi River?

Mr. ABEL. Well, the law calls for an annual judicial conference of all of the judges in the circuit, and would continue to call for that.

In addition, of course, those judges who are sitting together geographically will have ample opportunity for contact with each other.

Again, I come to the point of the balance of interests here, which it seems to me has to be continually reemphasized, and that is what price do we pay in terms of the quality of justice, and in uniformity of it, for this greater opportunity of judges to be with each other and exchange views on an informal basis? If that price becomes too

high, or if the importance of the other aspects of this outweigh the so-called collegiality issue, then I think the collegiality issue must yield, and that essentially is where we come out.

We think, at least I think, that the difficulties of contact are more imagined than real, and that in point of fact the normal rotation of panels, three-judge panels within the circuit is likely to expose most of the judges to each other over a relatively short period of time.

Mr. DREIFUS. May I add to that answer? With regard to the expense of travel, even under the division plan or the plan originally proposed to divide the ninth circuit, there will not be very much savings in travel. Looking at the proposed northern division shows the large travel distances are roughly the same, and the only travel saving would be between Los Angeles and San Francisco really, and that has probably the cheapest and the most efficient means of travel that I am aware of in the United States.

Second, with regard to the obligation of every one of the judges and of the lawyers in the circuit being obliged to read and understand and be aware of the law made in the other divisions, that I believe would continue to be necessary under the committee bill, under S. 729, because of the operation and effect of the joint en banc panel. So I do not believe there is any real difference between our amendment and the subcommittee's bill in that regard.

Third, with regard to the reference to the Fifth Circuit, I would say there is a cardinal difference between the two situations. In the ninth circuit we are faced with a proposal to divide a State in half. Nowhere have I seen in any of the proposals relating to the fifth circuit any proposal that the State of Texas be divided in half, or the State of Louisiana, or the State of Mississippi, or the State of Alabama, or Georgia or Florida.

Senator BURDICK. Well, they do not have a caseload comparable at all to California's, and you know that.

Mr. DREIFUS. Sir, that may be true now, but if the State of Texas grows like the people in Texas believe it is going to grow, there will be a proposal sooner or later to divide Texas, if such a proposal should go through for California.

Senator SCOTT. Would the chairman yield just briefly?

Senator BURDICK. Yes.

Senator SCOTT. I notice in the prepared remarks by the California Bar Association that the objection to the division of the State, and the witness just referred to concern the division of California. But if the court, in fact, has the stability to which you alluded a few minutes ago, what difference does it make? The decisions would be the same, relatively the same. I do not see the objection with this stable circuit that we have, the objection to having the State divided in two, so that one is one judicial circuit, and another is in another judicial circuit. What is your principal objection if it is not in regard to having the same law in both circuits? You have been making an argument to the effect that you are going to have relative stability in decisions, and comparable law, and what difference does it make if part of California is in one circuit and the other part is in another circuit?

What is your real objection to this? Is it parochial?

Mr. ABEL. Let me take a run at that, Senator.

Senator SCOTT. All right.

Mr. ABEL. As you know, there are a great many areas where California law and Federal law interrelate, and the fact is that inevitably, given two different divisions passing on cases coming up from lower courts in California, there are likely to be different results, different appellate judges see things differently, as Senator Burdick was pointing out. So that if you come to a situation in which the Court of Appeals for the Northern Division, sitting in the northern part of California, and the Court of Appeals for the Southern Division, sitting in the southern part reach different results on the same question of law, you have the necessity of resolving that difference.

You also encourage litigants and lawyers, both of whom are traditionally, and naturally optimistic about results, to go to the division where they are most likely to get the result they are seeking. Forum shopping. Consequently, there is an added factor of uncertainty introduced into the structure of the law where two different courts are going to be deciding the same general issues. I think that essentially is the danger.

Senator SCOTT. Well then, what you are saying now, Mr. Abel, is that the law is not as stable as the other gentleman was saying a while ago, or we are not as bound by precedent then, and it is not really as reliable and dependable as the witness was saying a few minutes ago? You are saying that it does vary between the circuits, and between different panels. Is this correct?

Mr. ABEL. It does. But, of course, our objective should be to minimize those differences and seek greater uniformity.

Senator SCOTT. That is the major reason you have the Supreme Court, is it not, to stabilize the law between the circuits?

Mr. ABEL. Certainly that is a major reason.

Senator SCOTT. That is one of the reasons they grant certiorari?

Mr. ABEL. Exactly. Of course, however, we want to do what we can to avoid adding to the burdens of the Supreme Court.

Senator SCOTT. Mr. Chairman, thank you for letting me intercede here. But it just seemed to be a little conflict, and you sort of wanted the best of both worlds. Maybe I misinterpreted. One, the law is stable, but do not divide California, and there seemed to be a little inconsistency. That is why I asked the Chair to let me intercede.

Mr. ABEL. I think essentially we want to avoid dividing California so as to minimize the opportunity for divergent developments.

Senator SCOTT. Thank you, Mr. Chairman.

Mr. DREIFUS. May I add to that answer?

Senator BURDICK. I want to follow up that answer for Senator Scott's benefit. Under the bill there is a joint en banc panel that represents both divisions of the circuit to resolve the problems that you referred to.

Mr. ABEL. Well, that is true. But, of course, our objection is you never get to having that additional joint en banc panel if you simply have an en banc procedure for the circuit where the en banc functions are discharged by less than all of the judges in the circuit.

Senator BURDICK. Well, let us make the comparison. Under your system you want to add judges, keep adding judges, and you did not give me the ultimate limit where you wanted to stop. But, let

us take it for the moment at 20 judges. Under our proposal we keep your circuit, we make it two divisions, and then one will have 9 judges and one will have 11, which is manageable. All 9 will operate en banc in the one division, and all 11 will operate en banc in the other division, and if there is any dispute between the two divisions, they will get together on the joint en banc. Is that not a simple operation?

Mr. ABEL. It is simple to describe it that way, Senator. Of course, in point of fact what you get at each of those levels is some procedural hassling at times, clerk's records, motions for further hearings en banc within the division, and then, further, a motion to hear en banc by the joint panel. And our point simply is why go to that difficulty if you can have substantial uniformity within the whole circuit by the very much simpler method of committing to a lesser number than the full number of judges in the circuit these en banc functions?

Senator BURDICK. The only problem is that you would not be assured of a majority point of view. That is the trouble with it.

Mr. ABEL. Over time you will, as I see it, because of the changing nature of the panel, the en banc panel.

Senator BURDICK. Well, I have found out where a matter was settled in the circuit that it takes a long, long time before it is unsettled again. It takes years and years, and almost generations on something that is settled, unless it is a 5 to 4 decision or something. It is really settled.

Mr. ABEL. Well, this, of course, I think is true. However, I think the development by this process of changing the en banc panel is likely to produce a greater uniformity of decision, and a more valid series of precedents which are more acceptable to later generations of en banc panels than the method of having simply a resolution at the joint en banc level of two en banc panel decisions coming up from below.

Senator BURDICK. Well, it seems to me that you have two divisions, a manageable court in each division, one has 9 judges, one has 11, and it seems to me your planning, and your travel, and everything else is made much simpler. The amount of disagreement for en banc is not great. I believe in California—how many en bancs did they have last year?

Mr. WESTPHAL. They had 174 petitions for, or suggestion of, an en banc hearing in the ninth circuit, and the ninth circuit only granted 8 of them. They denied 166.

Now, that is the greatest activity they have had in the last 4 or 5 years, because in the preceding year they only granted one en banc, and in the 2 years before that they did not grant any. And I think this is the objection you made a while ago, Mr. Abel, and that is that in the ninth circuit today, with only 13 judges, that until the congressional committees started, and the Hruska Commission started putting a little heat on the ninth circuit, they only granted one en banc hearing over a 3-year period. The Hruska Commission received testimony from lawyers in four different cities on the west coast where they held hearings that one of the principal objections was the amount of intracircuit conflict between various three-judge panels

where you would have two circuit judges sitting on each panel and one district judge, or a senior judge, or a visiting judge from someplace else. And you had all kinds of intracircuit conflicts. And notwithstanding that, the ninth circuit would not grant an en banc hearing for 2 years. They only granted one in the next year, and until heat was put on they did not grant any substantial number.

Mr. ABEL. Well, of course, one reason may be that to have an en banc hearing with the full number of judges on the circuit bench is a difficult thing to be arranged. It would be, I think, more practicable to have the smaller en banc arrangement in which it is easier, mechanically, for the judges to hear the en banc proceeding.

Let me make one point right here, because I think it is germane. Suppose our point is mistaken; that, that this would not work as well as we think it would. You could always switch later to a two-division concept, but you cannot go the other way. If you create this two-division thing now, and it proves unworkable, and the practical difficulties that we envision appear there, the difficulties of the three appeal levels, four total decisionmaking processes in the circuit, then you cannot go back. So I think it is worth pointing that out.

Senator BURDICK. The first thing that I wanted to say to you is that getting a law passed to make districts, or rearrange circuits or anything like that is not something like changing an electric light-bulb around here. We have been at it for 4 years to try to make this correction, and it is a long process.

Mr. ABEL. I understand that.

Senator BURDICK. I want to know under your theory that you simply add judges, to what point do you think that you can add judges until you really get inefficiency? Now, let us get a number from you. Is it 21, is it 23, is it 25? Where do you stop?

Mr. ABEL. I hate to be pinned down on that one, Senator.

Senator BURDICK. Well, this is what we are facing.

Mr. ABEL. I think 20 is not too large for a circuit, given the mechanics that the California amendment proposes for dealing with the en banc function provides.

Now, I think since there has never been a court with as many as 20, and certainly none with more than 20, it would be very hard for me to testify except as pure speculation as to where that maximum number comes in.

Senator BURDICK. We know that it is going to exceed 20. We know that from the projections.

Mr. ABEL. That the demands for the circuit—

Senator BURDICK. Yes. Where do we stop, then? If we take your proposition, where do we stop?

Mr. ABEL. I think as long as you have a procedure for dealing with the en banc function, and even that, we admit we do not know exactly how that is going to turn out, but we think it will work, and if it does work, then the limit on the number of judges within a circuit may be very substantially affected by how this en banc arrangement actually works in practice. That is, committing the en banc functions to less than the whole number of judges.

Senator BURDICK. Well, your bar association has done some study on this. Can you not give me a number where you think that we will really run out of efficiency?

MR. ABEL. I will ask Mr. Dreifus if he has an answer. For me it would be speculation, Senator, and I say that with all sincerity.

SENATOR BURDICK. Well, I can say to you that based upon the population growth in this country, and the population growth in California, and based upon the caseload and everything, we are convinced that it is going to go beyond 20. Now, how far beyond would you go before you would make it into two divisions?

MR. DREIFUS. Senator, as Judge Chambers said yesterday, the mechanics of organizing the court, and assigning the judges is a mathematical problem. It is as easy to assign 20, 25, 30, or any number. That is no problem. The problem comes in only with regard to the ability of the individual judges and the lawyers and the jurisdiction to follow the law, to follow the output of 20 judges.

Now, I think that it can be done easily, because as I said, we have a California Court of Appeals right now that has 20 judges, and they are grinding out opinions as fast as any other 20 appellate judges.

The entire California Court of Appeals for all of the districts has I think around 35 or 40 judges, and all of the California lawyers seem to be able to read their opinions. And the judges read each other's opinions.

If I may add one further remark, the division of the circuit, and dividing the State into two divisions or circuits, whether they are called divisions or circuits, would have this effect: To the extent that such a division would obey the rules of stare decisis of all of the decisions, you would very soon get a tendency that those judges and lawyers of the one division feel that they are a separate circuit and they would stop paying attention to the other division's decisions.

One of the reasons why there are relatively few en banc decisions, or en banc petitions now granted is the fact that even with 13 active duty judges, and what I think Mr. Westphal said, some 50 or 60 visiting judges sitting in the ninth circuit, the simple obligation to follow prior precedent has effectively held down the number of conflicts. But when you split a circuit into two divisions or circuits where each division no longer has the duty of following precedent other than its own, you will very soon get a parting of the ways in the jurisprudence generally, and this brings up the point that Senator Scott made in his question.

There is relative unity and stability of law within circuits. Regrettably there is a less degree of unity and stability between circuits because the Supreme Court does not have time to take all of the cases that it must.

SENATOR BURDICK. And that is why we have got the joint en banc panel, to take care of it.

MR. DREIFUS. Yes, sir. But that is not the whole story. So long as the State remains within a whole circuit, the problem does not arise because the circuit court of appeals up to the present time has been able to take care of its intracircuit problems. But under S. 729, the joint en banc panel possibly could take care of the whole story if it could take a lot more cases than I presently understand it is supposed to take the way it is drafted. But it still would not be the whole story insofar as you set up a divisional structure where the lawyers

and judges in each division will not feel the full degree of obligation that they now feel to be aware of and to follow the precedents made in the other division.

Now, you have two conflicting tendencies there. If the lawyers and judges of each division are to have an obligation to look at, to follow the decisions of the comparable courts in the other divisions, and of your joint en banc panel, then what you have got in essence is something very close to what we have proposed in our amendment.

Senator BURDICK. Well, do I understand your answer to my original question to be that you see no limit in the size of a circuit? Is that your answer?

Mr. DREIFUS. No, sir. It is not.

Senator BURDICK. What is your answer?

Mr. DREIFUS. It has a limit which is more than 20, but the figure I do not know, Senator.

Senator BURDICK. Less than 100?

Mr. DREIFUS. Oh, yes.

Senator BURDICK. Where would you put the limit?

Mr. DREIFUS. Senator—

Senator BURDICK. That is what we are facing. Let us not beat around the bush, because that is what we are facing, and where do we divide it?

Mr. DREIFUS. Senator, I do not know. All I can say is based upon whatever projections might be applicable I feel the the total number of judges is within the ball park of 20, and I think that is the practical question we have.

Senator BURDICK. That is not the practical question because we have to look ahead. We cannot decide on these things in a day. We are not going to make these divisions every year. We cannot rely on 20 judges taking care of that circuit, we just cannot for the years ahead. So we have to decide how far do we have to go before we make a decision about dividing north and south. That is my question.

Mr. DREIFUS. Senator, all I can say is, if and when we have 20 judges on the circuit, which I believe will be practical based upon actual experience, and some of the opinions of some of the judges whose opinions I respect, I believe that we will be better able to know what the limit is.

Senator BURDICK. And that will be 5 or 10 years down the road?

Mr. ABEL. Yes. I think that is right.

Senator BURDICK. Notwithstanding the fact that the survey by the Judicial Center runs unanimously that no judge felt you should have more than 15 in one circuit.

Mr. DREIFUS. Senator, I think as Mr. Abel stated there are other values at stake than the purely procedural values. And I would say this: I have not read the questionnaire, but I would ask did the questionnaire differentiate between the questions asked on the assumption that a circuit would not be so realigned as to divide a State between two circuits? Also, did the questionnaire pose the question: suppose the en banc problem was solved in some manner as we now suggest?

Senator BURDICK. But that could lead to a minority position, and that is not solving it, in my opinion. You are going to have nine judges decide for 20.

Mr. DREIFUS. Senator, as I say, and I do not think this point can be overemphasized, the division of State between two circuits where in effect the circuit court of appeals rules as the court of last resort, is a very serious matter. There has literally been an explosion of Federal jurisdiction over the last 30 or 40 years, not just in the traditional areas of patent law, and antitrust law, and copyright law and things like that, but in things like prisoners' rights, civil rights, environmental regulations.

We have a very recent case which we cited in our statement where a panel of the ninth circuit decided extremely important issues concerning the rights of prisoners in custodial treatment in the State correctional institutions. It would create a positive mess if we had two divisions coming even temporarily to opposing decisions on matters that sensitive.

Judge Chambers in his testimony yesterday mentioned a welfare rights case in which he said the ninth circuit told the Governor of California that he had better find \$200 million or \$300 million pretty quick, and I think Judge Chambers mentioned what a problem that would be if you had forum shopping in a case like that.

Senator BURDICK. But Judge Chambers did not accept either plan, if you will recall in his testimony, he did not accept our plan or your plan. He did not take either one of them.

Mr. DREIFUS. Well, he said I believe that either one of them were acceptable.

In this regard, Senator, we mentioned in our statement, we referred to the statement of the attorney general of California which is now in the printed hearings of last October. The California attorney general referred to I guess perhaps 20 or 25 statutes, more of which are being passed all of the time. We pose one example, the Deep Water Ports Act where the Congress, on some regulatory or subsidy program, has stated that review shall be in the court of appeals of the circuit embracing the State, or in which the State is located.

Mr. WESTPHAL. No; it said to the nearest adjacent circuit. You have a deep water port off of some continental shelf on the northern half of California, and under that Deep Water Ports Act your appeal would be the northern division of the ninth circuit. If that happens to be down in Santa Barbara Channel, then your appeal would be to the southern district. There is no ambiguity under that particular act.

Mr. DREIFUS. Well, I believe it says to the nearest adjacent coastal State.

Mr. WESTPHAL. All right.

Mr. DREIFUS. The court which embraces the nearest adjacent coastal State.

Mr. WESTPHAL. You tell me where your deep water port facility is located, and I will tell you where is the nearest adjacent State for the appellate review purposes of that act.

Mr. DREIFUS. Well, Mr. Westphal, in that particular statute what you state is a possible interpretation of the statute, but one which I am sure would be litigated for several years unless we provided for those cases.

Mr. WESTPHAL. We can either have a perfecting amendment to take care of some of those problems if the existing statute is not sufficient, and when we get the time we will get to the specifics of what the existing statutes provide. But, it would only take, even if Congress does not come up with a perfecting amendment that would solve that rather incidental problem, it would only take one decision and you would have it decided.

Mr. DREIFUS. We also have the problem, for example, of those numerous other statutes that the Attorney General cited. For example, the city of Sacramento, which in the State of California is the State capital, is located or would be in the northern division, and I do not think that it is appropriate to say that the northern division thereby has Federal jurisdiction over all of those matters.

Mr. WESTPHAL. If I may, Mr. Chairman?

Senator BURDICK. Surely.

Mr. WESTPHAL. In response to the point raised by the attorney general of California, who as Judge Duniway says sees a lot of parades of horrors, which Judge Duniway in his statement says he just does not think are going to exist, but you take a situation where an action is brought against an agency of the State of California to prevent that agency from doing something which is prohibited by Federal law. The relief granted by that court is going to enjoin that State official from carrying out that policy, not only in the one facility that may be located in the northern division, or the one facility that may be located in the southern division, but the court will enjoin that procedure from being followed throughout the State of California in any facility under the jurisdiction of that official. So that you are not going to have, in that instance, any problem by reason of the fact that the litigation is carried on in the northern division, or the northern district of California at Sacramento, and then the appeal is taken to the northern division of the ninth circuit, because the relief that will be granted will define what is proper activity for that part of the State's function throughout the State of California. Is that not true?

Mr. DREIFUS. Mr. Westphal, that might be true. You would simply be having the vagaries of venue determine which of your divisions is truly the Federal court of intermediate review in California. You would have a situation somewhat similar to one you had in Federal habeas corpus cases where the mere fact that a prisoner happened to be incarcerated in some district other than the district in which the State court was located where he was convicted meant that some Federal judge at a great distance away was reviewing the State judge's decision. That, of course, has been overcome by a transfer provision in the habeas corpus statute.

Mr. WESTPHAL. That got taken care of by a transfer provision, and one or two judicial decisions. But, Mr. Dreifus, what I have difficulty in seeing is this: At one time California only had two district courts, Federal district courts. It was not too long ago, about 1965 or 1966, or so, that two others were created. So all of a sudden you have four different Federal district courts, each of which can have jurisdiction over some State activity. And I assume that all of the actions that have been brought, and that have been mentioned by Attorney General Younger in his statement were brought in one of those district

courts under proper venue statutes. Now, had there been a choice of forum, I suppose if the Federal Government initiated that action they might have made some choice of forum, but that is allowed them under the law. If there is a conflict of opinion between those four district courts in California, that conflict was decided by the Ninth Circuit Court of Appeals. And the system is going to be substantially the same under S. 729 with this additional half step, and that is that if the two divisions are in conflict on law applicable in California, which is more than just California cases, by the way, that then it will be resolved by the joint en banc panel. So I do not see where you find a basis for your fears that to create two divisions will cause some instability in the law.

MR. ABEL. I am not satisfied, Mr. Westphal, that that additional half step, as you call it, which is really a full step as I see it, is necessary in order to make that resolution.

MR. WESTPHAL. It is necessary in order to resolve the conflict if you are going to have two divisions. The two divisions are necessary because you need 20 judges, and all of the testimony shows, and the experience shows, that a court beyond 15 is terribly inefficient. We know they are going not only beyond 15, because this bill would give you 20 judges, which is even 2 more than the Judicial Conference recommended, and the committee wants to see that you have enough manpower out there so that your civil litigants do not have to wait 3 years to get their case decided.

Now then, if you take that one step, you then get to the point that the chairman raised, which is that if it takes 20 judges today to handle that caseload in the ninth circuit, and we know that the caseload is going to increase; why wait to make a decision that you have to divide the circuit in some way because 20, or 21, or 23, or 27, or 40, or 50 judges is an inefficient organization? If the California plan were adopted, and the only response that Congress could make in the future was to give you the extra 5 judges, the extra 8 judges, the extra 10 judges to bring you up to 25, 28, or 30, under your proposal you would have what, a 30-judge court, and you would have 9 judges deciding what the law of the circuit is, and you would have 21 judges excluded from any input into what is that law of the circuit, except as they may be rotated every 6 months under the Hufstedler proposal, or except as you might have a random selection.

And so the perception, if I may just finish my rather long statement, the perception has been that a system under which you exclude 11 judges from any input in determining the law of the circuit, but yet say to them you must under the principles of stare decisis follow that law that is determined for you by the other 9 judges, or God forbid by a 5-to-4 decision of those other 9 judges, that that really is not too acceptable under the system that we are familiar with in this country. It would be even worse if you get to the point where those 9 judges decide the law of the circuit that would bind 21 other judges who have absolutely no input on it.

MR. ABEL. Let me take that last point first, because I think there is built into it an assumption that I for one am not really prepared to accept. Our law is full of situations where one group decides something that binds another.

Now, of course, historically, it is true that all circuit judges are equal. But I do not think that that means that we put that principle on an altar where in the public interest it can never be changed.

Now furthermore, if you rotate the panel, then the 11 judges who are making, or the 9 judges who are making the decision now will not be the same 6 months from now. So I do not think any judge who feels prejudiced by the fact that others within the circuit are making decisions which bind him need say anything further to himself than wait until I am on the panel; I have my equal access to the panel; my role as a circuit court judge is substantially on equal footing with that of the others; and you go from there.

Now, you asked me for examples, and one example, of course, is the Supreme Court, and another is in our State where there are intermediate appeals.

Mr. WESTPHAL. But Mr. Abel—

Mr. ABEL. But I want to take one more point first, if I may, and that is how do you know the caseload in the ninth circuit is going to multiply as you have described? How do you know that it is going to be necessary to have 30 judges in the circuit? I do not know that. If you take a look at some of the legislation that is pending in California and elsewhere, no fault, for example, what is that going to do? Arbitration, all of the various systems that are being devised to take cases out of the courts. And any change that might occur that would diminish the Federal court jurisdiction—I do not foresee those, but my point is why build the structure designed on the assumption that there is going to be a tremendous caseload growth in the ninth circuit if it may never occur?

Mr. WESTPHAL. Let me try to answer your last point. The Congress has watched the caseload in the fifth circuit. Once those States there changed, from what had basically been agricultural economy in Georgia and some of those other States, changed into an industrial economy, then that caseload within a 6-State area just exploded, and increased to the point where the Congress increased from 7 up to 15 in the number of judge required. We have seen that similar explosion in California, and those who advocate a northwest circuit to be carved out of the ninth circuit, they base the claim on the fact that they anticipate a huge increase in social and economic activity, and in population and everything else in Oregon, in Washington, in Alaska. And this is their basis for claiming that we should now create a northwest circuit, which if we create it now, would not have enough caseload to even keep three judges busy.

The other reason we feel that that caseload is going to increase is because as the Congress has tried to cut down the amount of jurisdiction placed in the Federal courts, it has been opposed by practically every bar association in 50 States. Senator Burdick was the author 4 years ago of a bill entitled S. 1876 that was recommended by the American Law Institute, and that bill would have made a very modest restriction on diversity jurisdiction. And there are those who will argue that diversity cases should not even be in the Federal system, they should be completely abolished. But the ALI proposal was that diversity jurisdiction should be modified so an in-State plaintiff could not invoke it; he could not come in and say that I as a

California resident and citizen cannot get a fair trial in my own State court; and, therefore, I want to invoke diversity jurisdiction of the Federal courts. And in 4 years—in the first year—this same subcommittee held about 15 or 16 days of hearings on that proposal, and there have been countless mailings and communications with State bar associations, and not one State bar association has supported that limited attempt by Congress to decrease the jurisdiction of Federal courts, as you have suggested. As a matter of fact yesterday your colleague, Mr. Dreifus, told me that his efforts to try to get the California State Bar Association to support that principle are not going anyplace because the trial bar of this country refuses to recognize some of these tough problems that the Congress is asked to deal with.

Now, Mr. Abel, I apologize for a rather long statement. But that is the reason why I can sit here and feel fairly confident that the problem that the chairman of this committee suggested to you, and that is that you are going to have to eventually create more judges because that caseload is going to grow, is a very valid premise upon which he asks you to commit yourself as to what is the highest number that you would tolerate on the court of appeals.

MR. ABEL. Mr. Dreifus.

MR. DREIFUS. I would like to make some comments.

First of all, Mr. Westphal did correctly relate the fact that we are having difficulty arriving at a conclusion concerning the proposal in S. 1876, but I hope to have the committee of the State bar make a report on it as soon as practicable.

But, to go to the issue before us with regard to Senator Burdick's question, what is the ultimate limit on the size of a circuit, I believe that question has to apply not just to the amendment we propose, but also to S. 729. If the ultimate size of the circuit is going to be a problem, it is a problem for both bills. And here I would like to add that when you stand back and look at our amendment, and look at S. 729, including some possible revisions of S. 729, and I hope I will not be out of order in referring to some discussions that I have had with Mr. Westphal in which he presented me with some possible draft amendments, there is not that much difference between the basic concepts of both bills. Both of them have what is in essence an en banc panel of nine judges taken from the whole number. There may be different methods of selection, there may be different ways of what the whole number of judges do with regard to how they sit in individual three-judge panels. But basically the structure is the same.

And I would like to state here on the record, even though it is in our printed statement, give credit where credit is due, the California amendment, the concept for an en banc panel of nine, less than the whole number of circuit judges in the circuit came directly from the committee print issued by Senator Burdick in December, which is the same as S. 729. We felt we were merely taking that basic concept and carrying it to its logical conclusion.

Senator BURDICK. Yes; but that is an entirely different en banc. Those four are from each division and represent the whole. They are bringing the point of view of the one division against the point of view of the other. But 11 have participated in the en banc in one division and the 9 fully participated in the other one, so they are just

representatives of the 9 and the 11, and that is the only difference there.

Mr. DREIFUS. Yes, Senator, but let us assume the circuit does grow so that you wind up with 30 circuit judges, 15 in one division and 15 in the other. You would still have a nine-judge joint en banc panel and, of course, for example, if they were picked by straight seniority, to which there has been a lot of criticism, you might have the southern division being divided on something by a heavy majority, and the only dissenters on the southern division would happen to be members of the en banc panel. You could have that situation. So in both S. 729, as in the amendment, you are faced with the same possible criticism, and I say possible with emphasis, because I believe in either case it is criticism that we can live with.

I think as in the case of S. 729, the four members who would be on the joint en banc panel, selected from the 9 of the 11 of each division, would bring to the joint en banc panel the feeling that they represent the entire circuit to the extent that they have had a feeling, to the extent that they have contact with their colleagues, and maintain a feeling of collegiality, and they would make a decision in a representative spirit, and in the same spirit that any appellate tribunal does in which they are deciding cases, in which the decision will govern lower tribunals. The Supreme Court does the same thing.

Senator BURDICK. I am afraid for you that your argument is leading right down to separate circuits as the Hruska commission found, because then you have no problem. If you got a different feeling in each circuit, you go to the Supreme Court and get it resolved. Is that the way you want to do it?

Mr. DREIFUS. No, Senator.

Senator BURDICK. We thought we would do you a favor when we had this division apparatus.

Mr. DREIFUS. Senator, the Supreme Court cannot devote itself to being the highest Federal court for the State of California. It simply cannot, and that would be a distortion of its functions.

Senator BURDICK. That is what the Hruska commission recommended.

Mr. DREIFUS. But it does not have the time to do it. It cannot spend 90 percent of its time on southern California cases.

Senator BURDICK. That is why we have this division concept. We can refer back to the Hruska commission findings very simply, and then you have no problem at all about the differences between the northern and the southern divisions. That is all gone then.

Mr. DREIFUS. Senator, I merely repeat what I said, that I do not believe the ultimate size of the circuit is a practical problem with regard to the proposal, either for S. 729 or for our amendment. And as I again said, we felt that in proposing what we in the State bar proposed that we were following a basic pattern, a basic kind of structure which originated with the subcommittee.

Senator SCOTT. Mr. Chairman?

Senator BURDICK. Yes.

Senator SCOTT. Gentlemen, being a new member of this subcommittee I do not have the same depth of information as the chairman or counsel has, but in listening to the comments that are being made, about the possibility of a 20-30-judge bench in the ninth circuit, and

being aware of some comment to the effect that perhaps we need another court in between the circuit and the Supreme Court, the question which occurs to me, and runs through my mind is this: With all of the new law that the Congress is writing, and the regulations of our administrative agencies, that maybe there are too many appeals being taken, and maybe the answer might be to assure every American the right to a fair and impartial trial, but put some limitation on the right to more than one trial. It seems to me after listening to the exchange going on here today that maybe there is no end to all of this as we get more and more people, and as our litigation becomes more complex, and there are more reasons to take a case to a Federal court. And I am sure there are similar problems in our State courts also.

But, it is not often that I get an opportunity to talk with California lawyers, being from Virginia. I would just like to get your views, if the Chair will indulge me, because this may be a little bit off the immediate question before this subcommittee. But, is part of the answer to this influx of appellate cases, further limitation on the right to go above the district court level, and to put some further limitation on the right to get into the circuit, or the Supreme Court? From time to time you hear that they do not have adequate time to consider all of the matters that come before them, and the suggestion of still another level of Federal courts is made.

Now, are we having too many appeals? And I know gentlemen, being lawyers, this is your livelihood, and yet if a person is afforded one good trial, is that due process, or should we put any limitation on appeals? Would that be a part of the answer to the problem that is confronting us here, this multiplicity of appeals?

Mr. ABEL. Senator you have raised an interesting question. I do not know of any move to reduce the number of appeals to the court of appeals level.

Of course, the trend of society in this country today is to exhaust a person's individual rights: that is, to push appeal and protect the right to appeal as a matter of right.

Senator SCOTT. I am all for protecting the rights of society or the individual. But I am just asking if his rights have to be protected by taking every case to the court of appeals, or by petitioning for certiorari and considering the possibility of consideration at still another level of Federal courts? Are we going too far here when we talk about the backlog in our courts, and the discussions were with the chairman asking what number of judges we would have within one circuit, and the answer being 20 at one place, 30 possibly at another place, no limit at another place. It may be that this panel or others have considered this from time to time, but still you are here, and I just wonder if you have an opinion? Are we going too far? Should we put some limitation, further limitation on the right to get into an appellate court? We would all agree that everybody is entitled to his day in court, but I am just wondering are they entitled to appeal in every instance, and then should the Congress consider some further limitation on the right of appeal?

Mr. DREIFUS. Senator, if I may, in clarification of an earlier answer, my own personal view is that ultimate size of the circuit we do

not know. But my guess is that in the foreseeable future it would be in the ball park of 20. My mention of the higher figure earlier was in a more or less hypothetical discussion.

But with regard to the other problem you mentioned, this is a fundamental problem. It is more fundamental than problems of courts and procedure. I noted in the editorial page this morning of the Washington Post a column which reported a very recent speech of Attorney General Levi in which he pointed out that there seems to be an expectation of society that laws and court decisions can solve all of the problems of society. And there is a tendency to try to bring every conceivable human problem into court, to put it into court pleadings and this just simply cannot be. It cannot be done.

Frankly, Senator, I do not know what the answer is. All we can do as lawyers is to observe what appears to have happened. I would agree with you that we face a fundamental problem.

Senator SCOTT. Well, you talked about some of these habeas corpus cases a few minutes ago, and we know that sometimes the inmates bring some of these suits, and I think we do have some cases that are brought that perhaps we could put some limits on the rights of appeals, further limits.

But frankly, Mr. Chairman, it is just something that flashed through my mind, and I thought perhaps you two gentlemen might have some views on it. Mr. Abel, you are president of the California bar. Do you have any thoughts that you could share with us on this?

Mr. ABEL. My view on that, Senator would be that the best hope is in reducing the number of cases entering the trial court channel. That is, I think there are many possibilities there. Arbitration is one. We have going in California now, for example, an experiment in which a plaintiff in a tort case, if he agrees to accept a judgment of under \$7,500, he may compel the defendant to arbitrate, and the defendant is bound by a law to do that.

Now, no fault, of course, is another thing. I think the way to reduce court congestion at the appellate level is to cut off the incoming stream farther up the river before it gets into the appellate court.

Senator SCOTT. If you deny a person the right to go to court, this could be a denial of due process, could it not?

Mr. ABEL. It could, of course, so that any legislation dealing with the subject has to have due regard for constitutional rights. But given that regard, I think that the hopeful avenue to follow on this is at the trial level rather than at the appellate level. That is not to close the door on the possibility, since you asked the question and I have been sitting here thinking and trying to think of some types of cases where you could say that a trial court is the last court, or it is the last court on certain issues, and at the moment I do not come up with anything that might be of great value. But I think the idea is worth exploring.

Senator SCOTT. For example, in your district court if people are not satisfied with the decision of a specific trial judge, let them perhaps have a three-man panel at the district court level rather than even get into the circuit court. Is there some machinery that would keep these cases out of the circuit courts? Mr. Chairman, I am not going to indulge further. I know this is speculation, and it is not

directly involved, but yet the thought comes to my mind that rather than creating additional judgeships perhaps we could find a way that an individual could have his day in court, but have his day, and not have his year, or 2, or 3, or 4, or 5 years in court, and still it does seem that the process is too long and too drawn out and unnecessarily so. I am not sure that due process includes the right in every situation to go to the circuit court or to petition for certiorari.

Perhaps through a study we might limit further the appellate process, and I was just seeking your opinion on something not directly related to this matter.

Mr. DREIFUS. Senator, if I may further respond, I would say that the bar association diligently is looking at things like that.

But to get back to your original question concerning habeas corpus cases, we do not know what the solution is. Some have criticized the great expansion of habeas corpus jurisdiction over State convictions, but without getting into the merits of that, so long as we have to have that large review jurisdiction by the Federal courts, that relates to what we have here, and a State can live with that Federal habeas corpus jurisdiction if it knows that the court of appeals in a unified way is going to make rules applicable to the States. But, you would be creating a very bad situation if you had a State divided between two divisions or circuits as that you would have habeas corpus law in one circuit or division applicable to State prisoners and reviewing State convictions where the judges do not feel a complete obligation to follow the same law throughout the whole State.

Senator SCOTT. Mr. Chairman, I appreciate your indulgence, and I am sure you have got this matter under control.

Senator BURDICK. I quite agree with Mr. Abel that if we are going to stop the chain operation we have to stop it at the district court, and that is why we have the ALI proposal, and are exploring no fault and things of that nature, because this is where the chain starts. It would be quite a problem for us to deny review and still maintain our constitutional safeguards.

Well, I just looked at the facts here, and in 1967 the ninth circuit went from 9 judges to 13, and now we are going to 20. Is it not a reasonable assumption that we will go much higher?

Mr. ABEL. I would say in answer to that the probabilities are that we will. There are uncertainties to it, but I think that is true, more likely to be true than not.

However, I am still of the view that we can move in that direction later. We cannot move back if we build a structure that is intended to cope with a caseload that somehow does not materialize.

There are a few items of evidence in terms of population growth, of course, and in the ninth circuit, particularly in California that population growth has been levelling off. On the other hand, the fact is that, as has been pointed out, society expects the courts to resolve more and more questions, and attorneys particularly I think are becoming aware that their duty to their client requires them to take an appeal under certain circumstances where there is any question about whether the outcome below has been in the client's best interest and represents full treatment of the case by the attorney.

So one can see arrows pointing both ways on caseload, and given that fact I would be very reluctant to go a route which assumes some-

thing which may never occur. I can perfectly well see your point, Senator, in that making a further change is not going to be a matter of changing a light bulb. This experience we have had with this proposal demonstrates that. And I do not know what your decision will be as to the fifth circuit. If you go the dividing of the circuit route into divisions there, and if you leave the ninth circuit as it is, dealing with it only as proposed in the California amendment, you will, of course, in time have an index of which of these two systems works better. If it turns out that the division of the fifth circuit is something that is workable and desirable, that could be the next step down the road in the ninth.

Perhaps that is an advocacy of a gradualist approach, but I think it is realistic.

Senator BURDICK. We think you are over the limit now.

Mr. DREIFUS. Senator, if I may add a comment concerning population, I do not have authoritative figures, but my recollection of the population growth of California is that it roughly doubled from 10 million to over 20 million from 1950 to 1970. But the current projections are that it is to level off through the seventies and eighties at somewhere around 22 or 23 million.

I do not know what the projections are for the Northwest States. I think their percentages are somewhat higher, particularly the State of Alaska, and perhaps also Oregon. But they have rather small populations to start with.

Senator BURDICK. They have small populations, but they are expecting big business.

Mr. DREIFUS. Especially in Alaska.

Senator BURDICK. Which brings litigation.

The staff has some technical amendments that they want to discuss with you for a minute.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Before I get to some specific amendments that the committee is giving consideration to, and which I would like to give you an opportunity to comment on, let me mention this. Under the proposal contained in S. 729, when the two divisions, or if the two divisions are created they will each be a division of the ninth circuit, so that starting out they will each have as judicial precedents the existing case law of the ninth circuit. Those judicial precedents, they will be bound to follow, because they are each part of the ninth circuit, so that we will have that degree of stability to begin with. You recognize that, do you not, Mr. Abel?

Mr. ABEL. Yes.

Mr. WESTPHAL. All right. Now then, each of these divisions would have the same freedom that the ninth circuit today has, and that is to change their own precedents, and you recognize that? They could by case decision decide that they are going to overrule one of their prior precedents and establish a new law?

Mr. ABEL. Yes. As to a point of first impression that it was not already governed by an existing law.

Mr. WESTPHAL. Now, before we get to the point of first impression, let us just talk about the existing judicial precedents of the ninth circuit. Each of these two divisions would start out with judicial precedents which they would be bound to follow. What I am suggest-

ing to you is that starting from that point, each division would retain the same right, which the ninth circuit has today to override one of its prior judicial precedents, and to create a new rule of law.

Mr. ABEL. All right.

Mr. WESTPHAL. You now understand what I am talking about?

Mr. ABEL. Yes.

Mr. WESTPHAL. Now, if we assume that the northern division for some reason should decide to override a prior precedent, right at that first decision you would then have, if this was a precedent that applied to law applicable in California, you would have an existing conflict between the northern division which has decided to make a new precedent and the southern division which theoretically is bound by principles of stare decisis to follow the old precedent, so you would then at that instance have a basis for the exercise of jurisdiction by your joint en banc panel in order to clear that up.

I think the record might show that you did agree by nodding your head to the statement that I just made?

Mr. ABEL. Yes. I am not sure where you are leading me, but so far I am being led.

Mr. WESTPHAL. I do not want to lead you down the primrose path. But let me mention this. Then we get to the point, assuming Congress passes some law, and it is litigated in one division or the other and it is a case of first impression, and again it is a law which would be applicable in the entire State of California, and the original case testing that law, let's say originates in the southern district at San Diego, and it would be passed upon let us say by the southern division sitting en banc, but because this is a matter of first impression it has been suggested that the joint en banc panel should have jurisdiction, have the discretionary authority to take that decision from the en banc panel of the southern division and to pass upon that question, because it is one of first impression and/or of primary importance. Do you think that that type of jurisdiction should be given to the joint en banc panel if there is going to be a joint en banc panel sitting astride these two divisions?

Mr. ABEL. Definitely.

Mr. WESTPHAL. All right.

Mr. ABEL. My answer to that is quite clear, that if you are going to have a joint en banc panel, and if you have a question of primary importance or first impression, or whatever other definition you want to attach that signifies a case of special significance, it would be a desirable feature to be able to bypass the en banc procedure within the division and go directly to the joint en banc panel.

Mr. WESTPHAL. All right now, that is a third possibility.

Mr. ABEL. Do you have any different views, Mr. Dreifus?

Mr. WESTPHAL. Well, let me just continue this, so that we can try to get it out. Under S. 729 the joint en banc panel would have jurisdiction to resolve any conflict of opinion or of decision between the two divisions regarding the validity or application or construction of any statute or Federal or State regulation or administrative rule that affects rights in California. Now, that is one head of jurisdiction that that joint en banc panel would have.

What I just finished talking about was the possibility that there could be created a second head of jurisdiction for that joint en banc

panel, and that is a head of jurisdiction to pass upon cases of first impression and/or of great importance in order to head off any possible action conflict between the two divisions. This would be in response to, I think, a criticism advanced by the attorney general of California that in the printed form of S. 729 there is no jurisdiction in the joint en banc panel to ward off the possibility of a conflict.

Now, do you understand the point that I am talking about on this second head of jurisdiction?

Mr. ABEL. Yes.

Mr. WESTPHAL. And I think you have just indicated you agree that that would be desirable to give that joint en banc panel a second head of jurisdiction in that way?

Mr. ABEL. Yes. If you are going to have this joint en banc panel. But now let me point out that at each of these junctures you have got procedural hassling, differences of opinion on whether the case is or is not a question of first impression, is or is not a question of great importance at each of these junctures between going from the district court to the three-judge panel on the one hand, or the district court to the en banc panel of the division, or from the district court to the joint en banc panel. You have procedural problems, uncertainties, delay at each turning point in the road.

And so while in theory it seems to me very desirable to be able to bypass the division en banc step and go directly to the joint en banc step, I only say that in the light of the very real objections it seems to me that by simplistically stating things alternatives are overlooked. There are too many little roadblocks that would cause a delay, some intermediate decisionmaking process to determine whether this is a case that should go to the joint en banc panel directly from the district court, time requirements, all kinds of bureaucratic steps that it seems to me merely serve to underscore the difficulties about having this two division setup.

Mr. WESTPHAL. Well, Mr. Abel, on that point, let me ask you how that would vary from your own State court system whereby you have your court of general jurisdiction, what is it, circuit court?

Mr. ABEL. Superior court.

Mr. WESTPHAL. Superior court. And how many different superior courts do you have in the State of California?

Mr. ABEL. One in every county.

Mr. WESTPHAL. All right. How many counties?

Mr. ABEL. Sixty-eight as I recall. Do you remember?

Mr. WESTPHAL. Sixty-eight counties?

Mr. ABEL. I have forgotten how many.

Mr. WESTPHAL. So you start in the California State court system with 68 superior courts which are the trial courts, and then is it five or is it six intermediate courts of appeal?

Mr. ABEL. There are five.

Mr. WESTPHAL. All right. So you have five intermediate courts of appeal. One has as many as 20 judges, and the others, the others have how many judges?

Mr. ABEL. As few as three.

Mr. WESTPHAL. All right. Now, beyond that court you have the California Supreme Court, so that at each one of those steps you have

the same kind of a delay and confusion, and procedural steps and bureaucracy that you fear under the S.729 proposal, is that not true?

Mr. ABEL. Well, not quite, because the only discretionary aspects in the whole appellate chain within the State courts is at the level of the supreme court.

Mr. WESTPHAL. Now then, under the California State court system, the California Supreme Court has, I take it, discretionary power to take a case of great importance, and it can bypass your intermediate courts?

Mr. ABEL. Yes. That is rarely done, but that is possible.

Mr. WESTPHAL. And I take it that the California Supreme Court has the discretionary power as to whether they will or will not entertain an appeal from the intermediate appellate court?

Mr. ABEL. Yes.

Mr. WESTPHAL. So that basically—

Mr. ABEL. There are certain classes of cases where there is an automatic appeal.

Mr. WESTPHAL. Yes, there are certain classes of cases where there is an automatic appeal as a right. Now, under the provisions of S. 729 there is an appeal as a right to the division where it would be heard by the three-judge panel, the same as it would be heard in one of your intermediate courts in the State system where you have some three-judge courts and even with 20-judge court operating in three-judge panels, does it not?

Mr. ABEL. Yes.

Mr. WESTPHAL. Whether or not the division will entertain the case in an en banc proceeding is discretionary, just as it is discretionary whether the California Supreme Court will hear a case, and they also sit en banc, do they not?

Mr. ABEL. Yes.

Mr. WESTPHAL. It is discretionary whether the California Supreme Court will hear en banc a decision made by three judges from any one of your five intermediate courts of appeal, so that this system that is proposed in S. 729 does not vary that greatly from the system you have in your own State court system, and you have managed to live with your own State court system, have you not?

Mr. ABEL. Well, I differ, and Mr. Dreifus may want to answer that question. I will listen to him and supplement it.

Mr. DREIFUS. If I may comment on your several questions, first of all, the difference in the analogy to the California State court system, rather the differences in this, the California District Court of Appeals does not sit en banc. It sits only in three-judge panels.

Mr. WESTPHAL. I understand that.

Mr. DREIFUS. Unlike S. 729 where you would have a division sitting en banc as well as divisional panels apparently before getting to the joint en banc panel.

Mr. WESTPHAL. But they would sit en banc only if in their discretion they decided the case was worthy of sitting en banc, and in the entire ninth circuit in the year 1974 there were only 174 such cases where counsel ever suggested that the case was of such importance that it ought to be considered en banc. Now, that is 174 out of 2,551 cases terminated in the ninth circuit in the year 1974.

Mr. DREIFUS. Yes. But if you recall Judge Chambers' testimony, he related that the consideration of en banc petitions takes a very large amount of a judge's time, because they all must, in the divisional case, all of the active judges of the division would have to sit and consider the en banc petition under the original draft of S. 729.

Mr. WESTPHAL. All right.

Mr. DREIFUS. Now, let me come to the amendment that appears to be suggested. May I say that I appreciate the courtesy of counsel for the committee in furnishing me a copy of a proposed amendment yesterday. But, as is so often the case in these extremely complex problems of court procedure and jurisdiction, it is very difficult to come to a final finished piece of work overnight. And while I have looked at it, and I can comment on it generally, these are not things that can be done overnight.

I would say this: as I understand the amendment and the comments of counsel here today, it represents a significant broadening of the jurisdiction of the joint en banc panel from that which appeared in the original draft of S. 729 as introduced. To that extent we certainly agree with it, because it goes in the direction, we think, of what such a joint panel has to do. As I say, I do not know whether I could completely agree with the language without making particular comments on it. But the direction of it is, functionally at least, in the direction of what the California amendment would do, because as I understand the amendment, it would give the joint en banc panel the power to, by its own decision, take a case. The power to bypass the division en banc.

Mr. WESTPHAL. In a case where it involves a question of first impression, or of primary importance.

Mr. DREIFUS. Yes. Well, as I say, I would have to take a look at those criteria to see whether they were actually broad enough. And I am only speaking about the general direction in which the amendment goes. It gives the joint en banc panel the power by its own order to bypass the division en banc and take a case directly, take a case directly from a three-judge panel. If that is the case, then that represents a significant improvement over what we thought was the intent of S. 729.

Now, our principal procedural objections to the structure of S. 729 was that it represented three separate en banc entities, and that the division en banc had to be exhausted before a petition could be considered by joint en banc panel.

Mr. WESTPHAL. I think, may I say, because I think this is an interesting and an important dialog, I think this perception of the language contained in S. 729, which is in section 25 of the bill, which would amend section 1291 of title 28, and the language you have in mind appears on page 23 of the bill, which says that the joint en banc panel shall have jurisdiction over any decision by a division which is in conflict with the decision of the other division, and affecting the validity, construction and so forth of any statute, et cetera, which affects personal rights in the same State, I think your perception of what that language is, is correct. It would require an actual conflict between the division, not necessarily sitting en banc. If you had, for example, if you had a three-judge panel decide a

question, and the division decided that it would not hear it en banc, then the decision of that three-judge panel would be a final decision of that division, and if it were in conflict with a decision of the other division, that then the joint en banc panel would have jurisdiction.

So that head of the jurisdiction which is contained in the printed bill is what I have been referring to as first head of jurisdiction, for the joint en banc panel, that is, the resolution of an actual conflict. So you and I are in agreement as to what that language was intended to cover, is that not true?

Mr. DREIFUS. Yes. And that is the reason why, and again repeating, giving credit where credit is due, while we agreed with the basic function, and considered the functional idea of a joint en banc panel and innovative concept, the State bar disagreed with the very limited jurisdiction that was set forth in S. 729. We felt that it could not do, perform the function that it was intended to perform.

Mr. WESTPHAL. All right. Now let us talk about this jurisdiction so that it will not be limited in your perception, and let us see if we can reach some agreement as to how broad it should be. Now, we are in agreement that we should have jurisdiction to resolve actual conflicts between the two divisions, is that not true?

Mr. DREIFUS. Yes.

Mr. WESTPHAL. All right.

Mr. ABEL. At that point, Mr. Westphal, may I interject? The bill, on page 23, line 7, has the words "and affecting the validity, construction or application," and so on. Now, the amendment which as I understand it was put in the record yesterday, which includes the provision for bypassing the division court, and going directly to the joint en banc panel, had somewhat broader language which read substantially this way: a determination of the validity, construction or application of any statute or administrative order, rule or regulation where it is shown to the joint en banc panel that a prompt review of such decision by the joint en banc panel is necessary, et cetera. My point is that that language I think should be in the language relating to the conflict of decision portion.

Mr. WESTPHAL. Well, I cannot agree with you, Mr. Abel.

Mr. ABEL. As well, in both places.

Mr. WESTPHAL. This is the purpose of my trying to lead this questioning here, so that we are all talking about the same thing, because I think that if the bill were to pass, and if it were to be amended, our hearing record should be somewhat clear as to just exactly what it is we are talking about in our efforts to broaden the jurisdiction of the joint en banc panel.

Now, the existing language is the printed bill as we have it here today on page 23, lines 1 through 10, that is one head of jurisdiction for this joint en banc panel, and that is based upon the existence of an actual conflict between the two divisions. And I think we all understand each other, that that is what is intended. Is that true?

Mr. ABEL. That is true. My point simply is——

Mr. WESTPHAL. I will get to your point.

Mr. ABEL. All right.

Mr. WESTPHAL. A second head of jurisdiction is that which is proposed in the amendment proposed by the chairman, and discussed

with Judge Chambers at the hearing yesterday, and which I furnished copies of to Mr. Dreifus, and I assume that you have seen that copy?

Mr. ABEL. I have it here.

Mr. WESTPHAL. All right. Now, if you will notice, that proposed amendment, what it would do, it would, beginning at line 10, after the existing language on line 10 of the bill, it would insert as a new numbered subparagraph a second head of jurisdiction for the joint en banc panel, and that would be jurisdiction to entertain a review of any decision, either by a division or by a panel thereof, involving a question of first impression or of primary importance where it is shown to the joint en banc panel that a prompt review of such decision by the joint en banc panel is necessary to avoid uncertainty and to promote uniform application of the law, either within a single State, which in this instance would be California, or within the several States of such circuit.

Now, in other words, what is intended there, as I would understand it, and as I would read that language, Mr. Abel, is that this joint en banc panel would have the power which the California Supreme Court has, which the U.S. Supreme Court has, and that is to take these cases of great importance, or of first impression, where you know that if we do not resolve that law right now, or resolve that question about the interpretation of the statute, or a new statute right now, that subsequent litigation will certainly produce a conflict. And rather than allow that thing to percolate, as the expression is, that the court feels that it is important to resolve it right now, and that is what is intended by the amendment proposed by the chairman. And I would here, in our discussion, call that the second head of jurisdiction.

Now, so my question to you is whether you agree that this second head of jurisdiction is appropriate, if there is going to be a joint en banc panel sitting astride the two divisions?

Mr. ABEL. I agree.

Mr. WESTPHAL. All right.

Mr. ABEL. But reiterating my prior observations about the difficulty in establishing whether or not at each of these turning points it is an appropriate case for a joint en banc panel.

Mr. WESTPHAL. But that is no different than the decision that has to be made by the California Supreme Court when it decides to exercise its authority to entertain an appeal from a superior court without waiting for a decision by one of your intermediate courts of appeal?

Mr. ABEL. Well, I do not recall the exact language that governs that step, but in any event, it is a point where discretion is required to be exercised by the court. And, of course, that is one of the aspects of this procedure that I am concerned about, because every time you have a court exercising discretion as to whether or not a case falls within a particular division, you have a procedural step, a delay, an argument, and we think it is important to avoid that wherever possible.

Mr. WESTPHAL. Really, Mr. Abel, there is no way that we can get around that, there is no way that the Congress can get around it

under the existing system. In every circuit, except the first where they only have three judges, you always have this threshold discretionary decision as to whether a court sitting en banc is going to rehear or to hear initially, because of its primary importance, one of the appeals filed in its court. So I do not see how we can avoid that. We have to rely on this discretionary power of the judges. I would hope that that discretion would be exercised in the better fashion than it apparently was exercised in the ninth circuit over a 3-year period in which they only held an en banc hearing on one case.

Mr. ABEL. If you have the joint en banc panel, you are stuck with that step.

Mr. WESTPHAL. But we have got that step throughout our system. And as our prior questioning here and discussion here today indicates, if we look at the 1974 record in the ninth circuit, there were only 174 cases out of 2,551 in which, because of a perceived conflict, or a perceived erroneous decision by a three-judge panel, or a perceived case of great importance that counsel ever suggested to the court that there should be an en banc panel. So that in looking at it that way, there should not be a large volume, as your statement indicates, "two-thirds of a caseload that would wind up in the joint en banc panel." What would wind up in the joint en banc panel is some part of 174 cases, because I assume that among those 174 suggestions for an en banc hearing which were filed in the ninth circuit last year, that a number of them were filed by counsel who felt that the three-judge panel had simply decided the case wrong, and they wanted the court en banc to correct what they felt was an error by the decision of the three-judge panel. So that this correction for rightness or wrongness under S. 729 is going to be exercised by the division sitting en banc, by 9 judges, or by 11 judges. But the function of the joint en banc panel is to give you this degree of unity, of judicial decision within the limits of the State of California.

Do we understand each other a little bit better on the theory of S. 729?

Mr. ABEL. Oh, yes. I understand the theory, Mr. Westphal. There is no problem of not understanding.

Mr. WESTPHAL. I thought it important to establish that.

Mr. ABEL. Oh, yes.

Mr. WESTPHAL. Because I appreciate there may be some difference—

Mr. ABEL. No.

Mr. WESTPHAL. As between us as to whether it should be a split circuit by having two divisions or whether it should be but one circuit with 20 judges and only nine of them sitting en banc, and we have got that basic difference.

Mr. ABEL. Well, we have got that basic difference, and then each step, as we described, of the features embodies in 729. I keep being struck again by what seems to me to be the practical difficulties in dealing with them.

Now, Mr. Dreifus I think has some comment about the number of instances where if California is not all in one division you will have a

greater caseload than is suggested by simply extrapolating the statistics on what the application for hearing en banc has been in the past.

Mr. WESTPHAL. What comment do you want to make on that, Mr. Dreifus?

Mr. DREIFUS. As I said before, the moment you divide a territory such as a State into what are functionally two circuits, if they are really going to be functionally that, then you will have lawyers and judges inclined to think of themselves in a separate manner, and you will have divergences grow. At the present time, the lawyers and judges throughout California and throughout the ninth circuit feel a duty to obey prior precedent made by the three-judge panels of the circuit in the past. And I would say that 174 petitions for hearing en banc out of 2,500 appeals is a substantial number.

Judge Chambers yesterday adverted to the amount of time that all of the judges must spend in considering these petitions, and they have to spend the time even though they deny the petitions.

Now, to come to the basic thrust of your amendment, I would say that we are in favor of any sort of an amendment of S. 729, as a hypothetical matter, if I may say this without saying that I endorse 729, we are in favor of any amendment which broadens the discretionary jurisdiction of your en banc panel to take a case, and completely bypass the need of the division en banc to even concern itself with the petition. To the extent that you do that, you eliminate one of the most serious sources of inefficiency and delay.

Mr. WESTPHAL. But then what you are suggesting is that you want, really what you want is the California plan, which is a court of 20 with only nine of them serving the en banc function. But what you give up under that plan is a great deal of collegiality in a court. You create a second-class judge whose only function is going to be to sit on a three-judge panel and grind out the first level of decision. He will have no voice in determining what is the law of the circuit. And as the discussion went with Judge Chambers yesterday when he was present, Mr. Dreifus, this is perceived to be quite a problem.

Mr. DREIFUS. Mr. Westphal, I would have to say that with regard to the first- and second-class judge comment, if that would be applicable to the California plan, I am afraid it would also be applicable to S. 729. I believe the joint en banc panel under S. 729 has functions similar to those, although not as extensive as under the California law.

Mr. WESTPHAL. But what you do not concede, Mr. Dreifus, is that to the extent that the nine judges in the northern division would sit in an en banc capacity, they would have input into determining what is going to be the law of the circuit, unless that law is overruled by the joint en banc panel. The same is true of the 11 judges in the southern division that are going to have input at that division en banc level into determining the law of the circuit.

Now, in those rare cases where the joint en banc panel is going to have to resolve a conflict, or set a rule of law in a case of first impression, or great importance, then you are going to have a decision out of a joint en banc panel which will be binding upon both divisions, which will be a judicial precedent in both divisions. It will be

added to this body of judicial precedent that each of these divisions will start out with.

But, what you have done under S. 729 is that you have organized a 20-judge court into two relatively efficient, 9 and 11 judge divisions, and you have greatly increased the flow of justice in the ninth circuit beyond that which exists today.

Mr. DREIFUS. Mr. Westphal, I believe the basic flow of justice depends upon the handling of cases by the three-judge panels. Most court of appeal decisions are those of the three-judge panels, and en banc decisions and the appeals to the Supreme Court are relatively rare in comparison.

The problem you have is this: If the divisions are each going to sit en banc, then one trades off the inefficiency and delay of having that divisional en banc step in there, with whatever it educationally adds, whatever it adds by way of contacts between judges which they do not otherwise have from the simple fact they all sit in rotation on three-judge panels, and presumably they all have personal contact with each other. As a strictly procedural step, we think that the joint en banc panel, assuming such a panel is to be constituted, should have the discretion in a broad class of cases to bypass the division en banc so that wholly unnecessary imposition on the time of the judges of the division can be avoided by the joint panel.

Mr. WESTPHAL. I would agree with you if the cases we are talking about are the cases of great importance, or of first impression. But to have a bypass for every case creates inefficiencies and defeats a lot of the principles that we have had in our circuit courts.

Now, we are running out of time, and I have a number of other specific things that I want to give each of you gentlemen a chance to comment on, before we run out of time here. Mr. Abel, you are familiar with the suggestion of Judge Chambers that judges who are eligible for a senior status, but who have not taken senior status, should be barred from serving on the joint en banc panel, under either plan?

Mr. ABEL. I am familiar with that.

Mr. WESTPHAL. Do you agree with that?

Mr. ABEL. To the extent I have any standing or authority to agree with it, I agree with it. I think that is a matter that is particularly within the province of the judges of the court. However, let me observe very firmly that I am in favor of broadening the participation in the en banc process as much as possible, and therefore, on that principal I would support what Judge Chambers has said.

Mr. WESTPHAL. All right now, let us get to the question, whether there is going to be a joint en banc panel, or whether there is going to be a panel of only nine or your California plan, the question of how you select those nine judges. Now, the alternatives or the choices available to the Congress are No. 1, to select those nine judges on a strict basis of seniority, which is the basis provided in S. 729, and it is the basis from which your California plan starts, subject to whatever other system the judges of the ninth circuit might decide to rule.

OK, now we both start with seniority, strict seniority. The other choice is to have a random selection whereby out of a hat containing 20 names you draw out 9.

A third possibility would be to start with seniority, but to provide for rotation, which is what we might refer to here as the Hufstedler proposal.

Now, are there any other alternatives other than those three that are available?

Mr. ABEL. I know of none, and I think you could probably think of some.

Mr. WESTPHAL. The only other thing would be to come up with some system whereby you would number each judge from 1 to 20 and say the first panel will be composed of judges 1, 3, 5, 7, and 9, and so forth, but that becomes unduly complicated to write, either into the statute or into a rule. Would you agree with that?

Mr. ABEL. Yes. You asked if there are any other possible methods. I suppose another one might be to have the Chief Justice of the United States make the appointments. But I would be, I think, opposed to that, simply on the ground that the Chief Justice is already overburdened, and a more prudent selection method can be left, it seems to me, to the judges of the circuit.

Mr. WESTPHAL. Well, let me comment on that, and I will not say whether I think the Chief Justice should have additional duties or not, but at one time there was a proposal that all circuit lines be abolished, that all 97 judges be put into a huge pool, and that they would have some administrator perform the function of composing three-judge panels out of that 97. And this was a proposal for overcoming some of these problems in the circuits, and when that proposal was advanced, I said that if they are going to have that, then I want to apply for the job of selecting those three-judge panels, because once you have the power to select what particular judges are going to preside at a particular term of court, or to hear a particular case, that almost carries with it the power to decide that case. Would you not agree with that.

Mr. ABEL. Do I have to?

Mr. WESTPHAL. So that if we had these three choices available that is, strict seniority, random selection, or seniority modified by rotation, then we can narrow our consideration down to these three?

Mr. ABEL. Yes.

Mr. WESTPHAL. Now, if you have strict seniority, I suppose the disadvantage to that is that it might be perceived that it is too inflexible in the sense that if your nine most senior judges were all conservative, you are going to make unhappy those who have a more liberal point of view. On the other hand, if all nine should happen to be too liberal, you are going to make somebody of conservative persuasion a little bit unhappy, and that is the basic objection to strict seniority, is it not?

Mr. ABEL. Yes.

Mr. WESTPHAL. All right. The advantage of strict seniority is that it gives you a relatively simple way of stating who the nine judges shall be. Do you agree with that?

Mr. ABEL. That is certainly true.

Mr. WESTPHAL. All right. Now then, on random selection whereby you would just pick the names out of a hat, I take it that that would be a selection of nine judges that would serve for a specific period of

time, 6 months or 1 year, and then you would make another random selection and compose another nine-judge panel. That is basically what you are talking about, is it not?

Mr. ABEL. Yes; of course, there are some modifications of that. That is, if on the first go around you have selected nine judges, you would want on the second I think to exclude those nine on the random selection, although that, of course, immediately poses the question of continuity, because if you have a complete turnover all at one time, the continuity objective becomes less attainable.

Mr. WESTPHAL. Another problem with random selection is—and I think Dean Griswold is the greatest opponent of that—he says that this reduces the system of justice down to the luck of the draw. And what it does is that it promotes and ferments litigation, because there is no stability, there is no element of predictability that enters into the law, and Dean Griswold argues that one of the greatest features of our Anglo-American system is that there is a degree of predictability, and that lawyers can use that as a tool when they advise a client whether they should or should not invest the time and effort into an appeal to a higher court. The lawyers can look at the people on that court and come fairly close to predicting whether the court will or will not entertain that kind of a question and what the outcome of that question might be.

So, would you agree with Dean Griswold that a random selection system is not desirable because it removes this element of predictability from the judicial process?

Mr. ABEL. Yes, I definitely would.

Mr. WESTPHAL. All right. So then the third possibility is to have a seniority system modified by a rotation. Now, Judge Hufstedler has suggested that there be a rotation of one judge every 6 months. If you just applied the mathematics of that, it would take $5\frac{1}{2}$ years for that system to work before you would have brought the 11th judge onto the court: It would take 5 years before you would have brought the 10th judge onto the court, and $4\frac{1}{2}$ for the 9th judge and so forth.

Now, this is some modification of seniority, but it really does not overcome a basic objection to the California plan, which is if you exclude 11 judges from your en banc function at any given point in time, even if you have rotation you will still have 11 judges excluded. It would take 5 or $5\frac{1}{2}$ years before you have every judge participating in an en banc function in some way.

Mr. ABEL. That is with a panel of 20 judges?

Mr. WESTPHAL. That is with a panel of 20 judges under the California plan.

Mr. ABEL. Mr. Dreifus wants to comment. But let me say this: I think this matter of how you choose the judges to sit en banc, or how the judges themselves choose is a very important and sensitive matter. I think we all recognize that judges, being people, are not all alike: they are not fungible. Some judges have a particular ability or proclivity for dealing with highly sensitive matters and, of course, by hypothesis the matters coming before the joint en banc panel, or the en banc panel, whichever system you use, are going to be the tough cases. So the mechanics should recognize that.

On the other hand, they should also recognize the very definite possibility that sitting on the en banc panel may tend to create two

classes of judges, and that would be true to some extent or another under both the bill and the California amendment.

MR. WESTPHAL. Let me make this further observation. A fourth possibility here is the one which you have in your California plan as a means of avoiding the tough decision as to just how you are going to select these nine judges, and that is to just let the judges themselves determine how they will select their nine. Now, if you stop and think about that for a moment, I am just wondering how satisfied the bar would be and the entire ninth circuit if the legislation were to leave to those judges the choice. Those judges would have no greater choice than what we have discussed here. They would either go by strict seniority, in which even you are going to make certain elements of the bar unhappy. Or they could go and select by the random system, where you would have lawyers feeling unhappy because of the so-called luck of the draw. Or they could have the seniority system with rotation, which in turn has advantages and disadvantages to it. How serious are you about legislation which would say let the judges themselves decide it by whatever they want to do by rule?

MR. ABEL. Bear in mind our statement does not take a firm position on that.

MR. WESTPHAL. Yes; but legislation that this committee passes will have to take a firm position, and we want your views.

MR. ABEL. That is what I am about to give you, for what it's worth. But it is my personal view, and not the view represented by the written testimony. I think you have the balancing of concerns here, some of which we have mentioned. First, the need to reduce the possibility that somehow there will be an in-group and an out-group of judges. That is the possibility that two classes of judges will be created.

Second, you have the objective of retaining to the degree you can the feature of collegiality which the judges have emphasized. That feature I think favors a rotation method, because if everybody has a chance to serve on the en banc panel in the course of time, the statute of each judge will be like that of every other judge.

The third point is that some judges are more competent at dealing with highly sensitive cases of the type that come before the en banc panel, and one needs to consider at least, perhaps not yield to, but at least consider how important it is to have the highest quality of decision on the en banc panel.

Balancing those three features, there may be others that one could think of, but balancing those three, I think that I would come down on the side of a rotation at some interval like 6 months, starting perhaps with an initial panel picked on the basis of seniority so that you would have, initially, on the panel the judges who have served the longest and were, therefore, in theory in least, more familiar with the history of decisions in that circuit.

MR. WESTPHAL. I think you have made a good suggestion, Mr. Abel, and the committee will give consideration to it.

I might mention in passing that I have had long discussions with your predecessor, Seth Hufstedler, about this particular problem, and it gets to be very difficult to write a statute, although not impossible. It just takes a lot of words to write a statute providing for a rotation.

There may be an advantage for Congress to write such a statute if it is able to do so, because then it is set by Congress and it is not left open to the complete discretion of the judges as to how they are going to compose what is a specific entity for a specific purpose under the congressional legislation.

Let me move on to another point if I can.

MR. DREIFUS. May I add one comment, Mr. Westphal? I believe that the mathematics of it under Judge Hufstedler's plan, in 5½ years all 20 judges would have served, or would have begun to serve.

MR. WESTPHAL. Right.

MR. DREIFUS. I would also like to add that no one subject caused as much discussion and difficulty for our State bar committee as the provision for selection or appointment of the judges, and since we submitted our amendment I personally have my doubts about the method of leaving it to the circuit itself, unless some very strict guidelines were added, because I have been told by a number of people that even if anything otherwise would not create first, second, third, fourth, or fifth class judges, by the time you got over the fight that might take place within the circuit over this, you would have considerable dissension and abrasion between the judges.

MR. WESTPHAL. Now then, in your statement on page 7 you mention the problem that might occur under certain statutes setting up administrative agencies, or under specific legislation such as the Deep Water Ports Act, of determining which of the two divisions would have jurisdiction over a certain type of administrative agency review. And of course, when the administrative agency review is in the district court in the first instance, there is no problem. Do you agree to that?

MR. DREIFUS. Well, there is no problem except that there is a larger distance to get to the joint en banc panel.

MR. WESTPHAL. I suggest you did not listen to my question, Mr. Dreifus. The question is if the administrative review under the law is put in the district court in the first instance, then there is no problem of determining which of the two divisions would have the authority to review the decision of the district court, if there is further review allowed?

MR. DREIFUS. That is correct.

MR. WESTPHAL. The problem comes in where the administrative review goes to the court of appeals level in the first instance, is that not true?

MR. DREIFUS. That is true. But I have to add a comment. If you have a venue choice between the district in the two different divisions, you might have an incentive to shop which you would not have now.

MR. WESTPHAL. Title 28, section 2343, which pertains to review of orders of Federal agencies states as follows:

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

Now, under that statute there will be no problem in determining which of the two divisions has jurisdiction to review this administrative agency, because I take it that the petitioner resides or has his principal place, or his principal office in only one of those two divisions, is that not true?

Mr. DREIFUS. That is true. But I believe that chapter applies only to the special statutory review of what are called the big four or the big six administrative agencies. It does not apply to all of these others matters applicable to the States.

Mr. WESTPHAL. You are right, and you have just anticipated my next question to you, which is that the area where we would have the problem is under those statutes which State that the review shall be in the circuit which embraces the State involved, or something of that kind, and there you will have a problem?

Mr. DREIFUS. Yes. You have a problem in any statute where the venue section is premised on what had heretofore been the universal assumption that a whole State is located within a circuit.

Mr. WESTPHAL. Now then, section 22 of S. 729 was an attempt to partly anticipate some of these problems, and we may not have anticipated it completely. But section 22 of the bill provides:

The terms judicial circuit, circuit court, judicial council of the circuit and court of appeals of the appropriate circuit as used in this title or other titles also mean and relate to a division of a circuit which has two or more divisions created pursuant to this act, unless the context in which that term is used necessarily excludes such meaning.

Now, in the light of the comments that you have in your prepared statement here today, I think that it would be wise for the subcommittee to give some further thought to what additional language would be needed in order to avoid there being any problem in determining which of the two divisions has jurisdiction to entertain administrative review in the cases not covered by big four statute. Do you agree with that?

Mr. DREIFUS. Yes. And I sympathize with the subcommittee's problem in that other subcommittees and committees of Congress are constantly adding statutes, and adding jurisdiction and venue provisions in many different ways, and I think the only solution is to go through the individual statutes, and cross-reference them, or make appropriate amendments.

Mr. WESTPHAL. One other point your statement makes is that in the provision which would allow 10 days within which to apply to the joint en banc panel, or to certify that the joint en banc panel was necessary for the consideration of a case, you suggest that the 10 days is too short. And you point out that under rule 40 of the Federal Rules of Procedure it provides a 14-day period. I might say that I am inclined to agree with you that we should have the same period of time, and 10 days probably is too short, but the least that we should do is have 14 days which will make it the same time factor as there is for an appeal in the first instance.

Mr. DREIFUS. May I make a comment on that, Mr. Westphal?

Mr. WESTPHAL. Yes.

Mr. DREIFUS. And I would note that Judge Duniway thoroughly agrees with us, and he recommends 30 days.

Mr. WESTPHAL. I understand that. The problem that I perceive is that if you start having different time factors in the ninth circuit than you do in other circuits, you have added some problems for lawyers who are not too familiar with the procedural steps in the ninth circuit.

Mr. DREIFUS. Yes. And I should add that the State bar in California, at the urging of many attorneys, has under consideration a

recommendation to the Rules Advisory Committee to change that 14-day period.

MR. WESTPHAL. Do you not think that the resolution of that question should be made in that fashion by the Rules Advisory Committee rather than by this committee in this legislation trying to come up with a different time factor? In other words, if 14 days is too short a period of time, within which to give counsel an opportunity to decide whether to appeal or not, should there not be a decision which affects the appellate procedures throughout the country rather than this limited phase of this particular procedure in the ninth circuit?

MR. DREIFUS. Yes, with one problem. The ninth circuit used to have 30 days before we had the Federal Rules of Appellate Procedure. It got reduced down to 14 days, and as a result of some urging, I attempted to do some research on where the 14 days came from. And I could not find anything over at the judicial center. I did observe that the second circuit and some of the eastern circuits had 14 days, and apparently that is where they got it from.

There is a big difference in sending a petition for a hearing or rehearing in Washington, Alaska, Hawaii, Seattle, Portland, or Las Vegas to San Francisco than it is to send it from Brooklyn to Foley Square in New York. And I believe the geographical differences in the circuits calls for differentiation, or at least if there should not be a differentiation there should be a substantially longer period. The Supreme Court allows 25 days.

Now, this brings up another drafting problem. With our amendment as drafted in such a way that procedural matters germane to the rules are placed directly in the appellate rules, I believe the subcommittee might wish to consider that in any bill that it recommends, procedural matters are separated out from the statutory matters and put directly in the rules, and we would be in favor of that, whatever bill is reported.

MR. WESTPHAL. In any event, we thank you for having called that problem to our attention, and also the problem about whether the time should run from service of the notice of entry of judgment, or from the entry of judgment. And I might explain that the draftsmanship having it run from the service of the notice rather than from the entry was based upon the rule which requires the clerk to immediately serve notice of the entry of judgment upon the entry of judgment. So, it might be a little bit longer time in running it from the service than from the entry of judgment, but I agree that it should run from the entry of judgment, and the period of time is a matter that the subcommittee will have to consider in the light of this discussion we have just had.

I think that is all the questions I have.

SENATOR BURDICK. I have no further questions. Before we adjourn the hearing we will receive for the record a letter dated March 17, 1975, together with a mailogram dated May 23, 1975 from the Bar Association of San Francisco, and a letter dated February 20, 1975, from Mr. Luck, the ninth circuit executive, to Mr. Westphal, the subcommittee counsel. There will also be received letters from certain senior judges from the fifth circuit; namely, Judge Elbert Tuttle, Judge Warren Jones, and Judge Richard Reeves.

The record will remain open to receive a statement to be submitted on behalf of the Lawyers Committee on Civil Rights Under Law.

Subject to the foregoing, the meeting is adjourned.

THE BAR ASSOCIATION OF SAN FRANCISCO,
San Francisco, Calif., March 17, 1975.

Re: Ninth Circuit Reorganization.

SENATOR QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: Thank you for your earlier letters, furnishing copies of S. 729 and S. 2990 (93rd Congress). The Bar Association of San Francisco appreciates the continuing careful consideration given by you to the needs of the Ninth Circuit.

We favor divisions so long as California remains intact

Congress should pass legislation to create divisions within the Ninth Circuit provided that a split of California is avoided. The divisional concept seems to be a worthwhile innovation to assist larger circuits to handle increasing case loads. Also the use of an executive committee of judges for en banc hearings is desirable for the larger circuits.

Therefore, the Bar Association of San Francisco opposes S. 729 (as well as S. 2990) only because it would split California between two divisions. We recognize that California continues to contribute a large percentage of the appeals to the Ninth Circuit. At the same time we foresee a potential for confusion and conflict and divisiveness, if parts of California are placed in different divisions. On the other hand, placing California entirely within one division would promote harmony of panel decisions affecting California. Any conflicts should be resolved at the divisional level.

The concept of dividing the jurisdiction of one court (the Ninth Circuit) into branches (divisions) has been utilized successfully in several state systems. Nevertheless, such division in itself entails some potential problems and risks. We believe that a split of California greatly would compound the problems and risks attendant upon the experiment of dividing the circuit.

Divisional lines may become new circuit boundaries

There is a further consideration. Although the divisional concept is promising, it represents something of an experiment. In the future the Congress may determine to create two new circuits in place of the Ninth Circuit. There would be a natural tendency to create those circuits along divisional lines earlier established. Any such solution, if California already had been severed into two divisions, would not be palatable and would be vigorously opposed for the reasons expressed by us last fall.

We reluctantly accept another litigation tier

We do have some misgivings about the creation of another tier for litigants and lawyers in the setting up of divisional review en banc between the panels and circuit review. But, the potential advantages to us outweigh this drawback. Larger and larger circuits of twenty and then twenty-five or thirty judges should be able to work more cohesively in two (or more) groups. If so, this will mean better unity within each division with clearer guidelines for the trial judges. Use of an executive committee for circuit en banc hearings should facilitate resolution of any inter-divisional conflict.

Endorsement of additional judges

We do favor the proposed addition of seven judges in the Ninth Circuit. More judges definitely have been needed for some time. But we cannot be sanguine that twenty judges will be able to work more cohesively together than two groups of judges of a lesser number. California alone or California with one or more states (e.g. Arizona or Hawaii and Guam) should constitute a division. The thirteen judges or so required for such a division should be able to work together more cohesively than the same number that have had to cover the entire area of the Ninth Circuit.

Endorsement of a joint en banc panel

We believe that an executive committee for en banc hearings is a workable idea worth trying. Gathering nine judges would be much easier than gathering

twenty. It is doubtful that argument to twenty judges is really feasible. Certainly decision by nine can be accomplished more swiftly and certainly than decision by twenty.

The scope of the panel should extend to all inter-divisional conflicts.

Opposition to selection of the panel by seniority alone

We oppose selection of the joint en banc panel on the basis of seniority alone. The panel should be more representative. All judges in the circuit should have more of a sense of participation or of a chance to participate.

We prefer selection of the executive committee or joint en banc panel on a basis of qualified seniority. Perhaps, the initial terms for the senior judges could be for 1, 2, 3 and 4 years with vacancies filled from the rest of the judges by random selection.

Please be assured of our keen and continuing interest in this matter. We appreciated your invitation to send a spokesman to testify at the hearings this week, but we believed that this letter could present the Association's views adequately. We ask that our letter be made part of the record. We are sending copies of this letter to other interested associations and persons.

Respectfully yours,

E. ROBERT WALLACH,

President.

BERNARD PETRIE,

Chairman, 9th Circuit Committee.

[Mailgram]

SAN FRANCISCO BAR ASSOCIATION,

San Francisco, Calif., May 23, 1975.

Sen. QUENTIN N. BURDICK,
Washington, D.C.

DEAR SENATOR BURDICK: The San Francisco Bar Association respectfully calls your attention again to its letter of March 17 on the two-division proposal for the ninth circuit. We endorse the position of the California State Bar, seeking seven additional judges for the circuit and supporting the executive committee en banc concept. Also we continue to support the concept of division, so long as California is kept intact.

ROBERT WALLACH,

President.

OFFICE OF THE CIRCUIT EXECUTIVE,
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
San Francisco, Calif., February 20, 1975.

WILLIAM P. WESTPHAL, Esq.,
Chief Counsel, U.S. Senate, Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR BILL: I enjoyed talking with you at the National Conference on Appellate Justice. I thought it was a very interesting and informative assemblage.

Otherwise, I am answering your letter of January 2, 1975, about the number of suggestions for rehearing en banc filed in this court in Fiscal 1974.

In that year 174 such suggestions were filed. Of these, 166 were denied. Of the remaining eight, the court held hearings en banc in five, and the other three were submitted to the court en banc without argument.

Best regards,

Sincerely,

WILLIAM B. LUCK.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Atlanta, Ga.

Hon. WILLIAM J. WELLER,
*Deputy Counsel,
Subcommittee on Improvements in Judicial Machinery*

DEAR MR. WELLER: Your courteous letter addressed to me as a senior judge of the Court of Appeals of the Fifth Circuit was forwarded to me here where I am sitting with the Ninth Circuit but without a secretary's assistance.

I have not heretofore made a statement concerning the current proposed legislation to realign the Fifth and Ninth Circuits because I feel that the Active Judges would express adequately any arguments pro or con.

However, I do find myself in liaison with the minority of our judges. I deeply regret the circumstances which seem to dictate a split of the Fifth Circuit, I can best express my reason by aligning myself completely with Judge Wisdom in his several statements. Our court would lose much of its characteristics of a truly National Court, if it were to be divided.

Sincerely yours,

ELBERT P. TUTTLE.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Jacksonville, Fla., May 2, 1975.

WILLIAM J. WELLER,
Deputy Counsel, Subcommittee on Improvements in Judicial Machinery,
Washington, D.C.

DEAR MR. WELLER: Your letter of April 28, 1975 is acknowledged. I am not among those who think that you can improve a court by adding additional judges, hiring additional law clerks and disposing of appellate cases in a summary manner.

As you know, there are a considerable number of lawyers who feel that the constitutional right to be heard should include a right to have someone with an ear to listen which would permit oral argument wherever desired. There are some who feel that there may be too much adjudication by court personnel other than judges.

I think it is most desirable that the Fifth Circuit be divided. If it is to be divided, I see no reason why it should not be into two circuits rather than two divisions even though there may be some basis for this fictional procedure in splitting the Ninth Circuit.

I do not think the ends of justice will be served by being able to boast of the largest constitutional court in history.

Yours truly,

WARREN L. JONES,
U.S. Circuit Judge.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Montgomery, Ala., May 6, 1975.

WILLIAM J. WELLER, Esq.,
Deputy Counsel, Subcommittee on Improvements in Judicial Machinery,
U.S. Senate, Washington, D.C.

DEAR MR. WELLER: Your letter of April 28th inviting me to send to the subcommittee staff my views concerning circuit realignment is heartily appreciated. Being invited, I must in good conscience respond, despite my deference to my Brothers who are in regular active service and my reluctance to raise the ugly subject of racial prejudice on which my views may be considered extreme. I am happy that on some fronts the war against racial discrimination appears to have been won. However, the victory is far from complete, and it is too early for us to rest assured that the present advances are safely permanent. It may be significant that while the Fifth Circuit contains a larger percentage of Blacks than any other circuit, no Black has been or in the foreseeable future will be appointed in this Circuit as either a circuit judge or a district judge.

These views have troubled me from almost the beginning of the legal and social revolution which still affects our Nation as a whole, and is most acute in the six deep South states of the Fifth Circuit.

On May 19, 1964, I wrote to The Honorable Robert F. Kennedy a letter some parts of which I may reveal without breach of confidence or unpleasant reference to individuals. Because my views on the subject remain the same as those expressed in that letter, I quote at some length:

"My dear Mister Attorney General:

"I plan to be in Washington on June 16 and 17 and hope that it may be convenient for you to discuss with me at that time the proposed split of our Fifth Circuit. In my opinion, that proposal, if enacted into law, will probably delay for many more weary years the dream of our Negro citizens for equality before the law.

"I cannot reasonably ask you to spare me the length of time needed to tell you my views on this subject, and even if you could do so, my granddaughters would probably be tugging at my coattail to guide them around Washington as I have promised. I hope, therefore, that you may find time to read and consider this necessarily long letter. The carbons enclosed are for your convenience in the event you care to discuss its contents with Mr. Burke Marshall, Mr. John Doar or other members of your staff. While your opposition to this proposal might be decisive, I do not ask that you become involved unless you see fit, but do ask your views as to whether I am unduly alarmed and, if not, as to the course I should follow to prevent the proposed split.

"You or some of your staff may have attended the meetings of the last Judicial Conference of the United States. The Chief Justice has not yet, so far as I am aware, made its proceedings public. However, a news story out of Washington on about April 21st showed that 'the proposed split would reduce the circuit to four states—Alabama, Florida, Georgia and Mississippi—by creating an eleventh circuit composed of Louisiana, Texas and the Canal Zone,' that 'a resolution calling for the rearrangement has been approved by the judicial conference,' and that 'details of the plan came from Hubert H. Finzel, chief counsel of the Senate subcommittee on improvements in judicial machinery, who is helping to draft the bill.' Since that news story, two proposed drafts of legislation that would have the effect of dividing the Circuit have been submitted to the Circuit Judges of the Fifth Circuit for their views as to technical draftsmanship.

* * * * *

"The proposed split having been approved by the Judicial Conference, it may seem presumptuous for me to further resist it. In my opinion, however, the probable effects of this proposed split go beyond questions of judicial administration and the business of the courts to which the functions of the Judicial Conference are limited. See section 331 of Title 28, United States Code. While the President and you are preoccupied in securing passage of the 1964 Civil Rights Bill, this proposed split, if enacted into law, might constitute a second line of defense having the potential of delaying for the foreseeable future any enforcement of present or future civil rights. I have in mind more particularly the hard-core states of Alabama and Mississippi.

"I have the utmost respect for the integrity and ability of every Circuit Judge on the Fifth Circuit as now constituted. I would deplore, however, the loss by the Fifth Circuit of the services of such judges as Judge Wisdom and Judge Brown. I do not mention Judge Hutcheson, for on account of his advanced age we cannot hope to have the benefit of his services much longer. * * * Thus you can understand my concern, and even alarm, over the probability that if Louisiana and Texas are excluded from the Fifth Circuit a majority of the judges of the Court of Appeals for the reduced Fifth Circuit will not favor a policy of vigorous and effective enforcement of civil rights. If my pessimistic apprehensions should prove true, the probable effect upon the district courts within the Circuit can be accurately foretold by considering their recent past history as contained in a carefully documented Comment, *Judicial Performance in the Fifth Circuit*, 73 Yale Law Journal 90 (1963). In the absence of a strong Court of Appeals, the Supreme Court is too remote to have an effective control over the conduct of the district courts.

"If the civil rights issue could be avoided—and it cannot—I would still be opposed to the legislation as uneconomical, unnecessary and unwise. To elaborate upon such views, however, would unduly prolong this letter. * * *

"My duty, it seems to me is to do whatever a judge can with honor and dignity do to prevent this proposed split of the Fifth Circuit, and I earnestly seek your advice to that end."

Parenthetically, I would repeat as of the present time a sentiment expressed in the foregoing letter and emphasize that I have the utmost respect for the integrity and ability of every circuit judge now on the Fifth Circuit but, because of differences in viewpoints among the various judges, I would deplore the loss by the Fifth Circuit of the services of those judges who reside either in Louisiana or in Texas.

My apprehensions were accentuated by the pressure for my retirement brought about by a provision of the Omnibus Judgeship Bill, as I explained in a letter to Mr. Justice Hugo L. Black on February 15, 1966:

"My dear Mr. Justice Black:

"I am sending to you as our Fifth Circuit Justice a copy of my letter of retirement forwarded this day to the President. As indicated, I hope to continue to perform the duties to which I may be designated and assigned either by the Chief Justice or by the Chief Judge or Judicial Council of the Fifth Circuit. Indeed, my retirement is more in name than in fact. The timing of it is occasioned by the Omnibus Judgeship Bill, which I am informed will probably be enacted into law within the next two weeks and which includes the following provision: '(c) The President shall appoint, by and with the advice and consent of the Senate, four additional circuit judges for the Fifth Circuit. The first four vacancies occurring in the office of circuit judge in said circuit shall not be filled.' The Administrative Office advises me the Department of Justice construes that provision to mean that the first four vacancies occurring after the bill has been enacted into law shall not be filled.

"In closing, may I again advise you that I am going to keep on working as long as I am physically and mentally capable, and I feel no evidence of failure at this time. It has been one of my highest privileges to work under you as our Circuit Justice."

My general views on circuit realignment remain the same as expressed in a letter which I wrote to Chief Judge Brown on May 29, 1973, and a part of which I quote:

"Dear Judge Brown:

"I thank you for **your** letter of May 24 and for requesting the views of the Senior Judges.

"It seems to me that the first and most important question to be answered is whether a geographical realignment of the circuits is necessary or even advisable to relieve overburdened Courts of Appeals. I think not for many reasons.

"No judge familiar with the enormity of a court of appeals' work would minimize the seriousness of the problem, but is geographical realignment the answer? For the first time since the creation of the Courts of Appeals in 1891, we face the problem on a national scale. Solving the problem by merely creating new circuits has many disadvantages, among others the following:

"1. For some circuits, as of today it may offer a possible, but temporary, solution. For others, such as the District of Columbia Circuit, geographical realignment appears already to be impossible. For such populous states as New York and California, geographical realignment would require in the near future placing parts of the same state in different circuits.

"2. The boundaries of the circuits should aid the Courts of Appeals in performing their functions as national courts. Courts composed of judges from states with diverse interests and traditions can be expected to maintain a broad and nationally comprehensive outlook, while courts composed of judges from a single state or from two or three states might tend to become provincial. Extending this thought into the foreseeable future, geographical realignment may increasingly tend to lower the efficiency and prestige of Courts of Appeals as truly national courts.

"3. Each of the present circuits has a well-deserved pride in its traditions, methods, and decisions, which it follows in preference to those of other circuits, but with due respect to the other circuits. Such balance of values with which the several circuits are now familiar will be disrupted by any comprehensive geographical realignment.

"4. Creation of additional circuits may result in more inter-circuit conflicts, which would either add to the burdens of an even more overburdened Supreme Court or require the creation of some new tribunal, such as the presently proposed National Court of Appeals. As between the alternatives, it is far better to keep the conflicts intra-circuit and settle them by en banc Courts of Appeals, than to add to the burdens of the Supreme Court."

In addition to the views expressed in the foregoing letter, and in lieu of a geographic split, I suggest that the core of the boil be removed by developing a less burdensome method of settling intra-circuit conflicts. I agree with the following suggestions made by Judge Wisdom:

"I should like to say a word on en bancs. There is no reason in the world why we should have an en banc court of 15. If the cause for putting a case en banc is a conflict within the circuit, that can be disposed of by another panel that is not composed of members who sat on the conflicting panels, or it could be disposed of by an en banc court of five. Of course, that would take legislation. The British use a court en banc of 5 and they, too, have a full court of 15, plus trial judges to draw on, in their court of appeals, criminal division.

"One of the criteria we have been using for putting a case en banc is the importance of the case. I believe that this is a serious mistake. If the case is very important, by putting it en banc we simply delay its getting to the Supreme Court, possibly by as much as 8 months to a year. The importance of a case should no longer be used as a criterion for hearing cases en banc.

"I feel that the burdens of en banc hearings are greatly exaggerated. Certainly the fifth circuit should not be divided because of 10 or 15 extra cases that are heard en banc. If we must have an banc hearings to settle intracircuit conflicts, I would suggest legislation allowing three judges, neutral judges, or a panel of five chosen at random, to settle intracircuit conflicts."

(Hearings, Part 1 Circuit Realignment, p. 101.)

As to the Fifth Circuit I would make a substitute suggestion, that is to create by legislation an en banc panel of seven judges to consist of the Chief Judge of the Circuit and the senior judge in regular active service from each of the circuit's six states. I would suggest leaving to that panel also the question of which hearings or rehearings should be considered en banc. If and when the en banc problem is solved, the number of three-judge panels can be increased as needed, and creation of new circuits and geographical realignment will be unnecessary. Our circuits as now constituted can then be permitted without disruption to continue their steady improvement of the administration of justice.

Again thanking you for the privilege of submitting my views, I remain,
Sincerely,

RICHARD T. RIVES,
U.S. Circuit Judge.

STATEMENT OF NEAL P. RUTLEDGE AND TERRENCE ROCHE MURPHY ON BEHALF OF
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman: We are Neal P. Rutledge and Terrence Roche Murphy, members of the Washington law firm of Wald, Harkrader & Ross. We submit this statement on behalf of the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee was organized in 1963 at the express request of the President of the United States to mobilize the energies and resources of the private Bar in support of the movement to remove racial discrimination from American life through legal process. Each succeeding President expressed renewed support for the Committee and its objective. The Committee has a national Executive Board comprised of lawyers practicing in most major cities and a national office and staff in Washington, D.C. It also operates a Field Office in Jackson, Mississippi, staffed by four attorneys. Associated committees operate in Washington, Chicago, Philadelphia, Boston, and San Francisco. Affiliated offices are in Los Angeles, Cleveland, Kansas City, Indianapolis, New Orleans, Birmingham, and Atlanta.

Mr. Murphy is a member of the Executive Board of the Washington Lawyers' Committee and had handled litigation for that office and for the national Lawyers' Committee and its Mississippi Field Office at various levels in the federal judicial system, including the United States Supreme Court; he has also acted as trial counsel to plaintiffs in school desegregation litigation in the United States courts in Louisiana. Mr. Rutledge is a former Professor of Law at the Duke University Law School, practiced for many years in Miami, Florida, and has appeared on numerous occasions before the United States Court of Appeals for the Fifth Circuit.

Through its Mississippi Field Office and otherwise, the Lawyers' Committee has been active before the Fifth Circuit. In one example, the leading recent case of *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974), the Circuit (acting *en banc* upon the application of Lawyers' Committee counsel) modified and strengthened its panel's previous order and directed the District Court to require the Mississippi Highway Patrol to undertake an affirmative action hiring program to offset the effects of past job discrimination. Against this background, the Committee has reviewed the legislative proceedings concerning S. 729 and its predecessor bills. The Bill's impact upon the Fifth Circuit requires us respectfully to oppose its passage.

1. In our judgment, the Bill should be seen for what it is, a program for the permanent and almost total split of the Circuit into two new federal courts

of appeals.¹ Both new courts—apparently for nostalgic or historical reasons—are to bear the title “Fifth Circuit.”² Thus, the legislation would divide the Fifth Circuit into an Eastern and a Western “Division,” including Louisiana and Texas in the Western Division and Alabama, Georgia, Florida, Mississippi and the Canal Zone in the Eastern Division.

A similar divided system would be established in the Ninth Circuit, but unlike the Ninth, the “Fifth Circuit” under S. 729 would not enjoy any provision for the resolution of the intra-circuit or inter-divisional conflicts or for considerations of major issues at the circuit-wide level. Thus, S. 729 provides for a “joint *en banc* panel” with membership consisting of the “four most senior judges in regular active service in each division, excepting therefrom the senior chief judge who shall sit and preside *ex officio* on the “joint *en banc* panel.” But that provision applies *only* to “any circuit consisting of two divisions, each of which has jurisdiction over cases arising from a United States district court sitting in a single state . . .” Clearly, this would apply only to the Ninth Circuit and appears intended to deal with the need for a uniform body of federal appellate law applied to California, which contributes the great bulk of the case load of that Circuit.

The Lawyers’ Committee has no unique expertise in California or before the Ninth Circuit, but we point out that in specifically providing joint *en banc* panels in the Ninth Circuit-California context, the legislation makes clear by omission (and Senator Hruska’s March 1975 statement makes explicit) that no such coordination techniques is to be followed with respect to the proposed “Fifth Circuit.” Rather, the two “Divisions” are to go their own way, with the Western Division centered in New Orleans as the Circuit is now, and the new Eastern Division to be based in Atlanta in a new federal court house that even before this Bill clears the Subcommittee already has been designed to include the new “Division” with provisions for courtrooms, chambers for the full court, a Circuit or “Division” library, and substantial facilities for support staff. Thus, it is well to recognize that S. 729 irrevocably would divide the Fifth Circuit; the fact that each “Division” would bear the original name appears to be of only cosmetic significance.

2. The Lawyer’s Committee recognizes that some method of accommodating the increased load of the Fifth Circuit should be found. But we point out that this problem is not unique to the Fifth, or even to the Fifth and Ninth Circuits. Thus, while the Fifth Circuit’s pending case load at the end of Fiscal Year 1974 was 477.5% over that pending at the end of Fiscal Year 1961, the Fourth Circuit’s was 883.0% over Fiscal Year 1961, the Seventh Circuit’s was 506.1%, the District of Columbia Circuit’s 367.6%, and the Eighth Circuit’s case load was 278.5% over Fiscal Year 1961. Even the First Circuit, traditionally enjoying a relatively light case load, showed a 221.6% change over the end of Fiscal Year 1961. (1974 Annual Report of the Director of the Administrative Office of the United States Courts, p. 183).

In addition, while the Fifth Circuit’s pending case load per judgeship went from 44 in Fiscal Year 1961 to 154 in Fiscal Year 1974 (a 250.0% change), the Fourth Circuit’s pending case load per judgeship increased from 20 in Fiscal Year 1961 to 140 in Fiscal Year 1974 (a 600.0% change). The D.C. Circuit’s per judgeship case load rose from 36 to 136 (a 396.0% change), the Seventh Circuit’s from 21 to 112 (a 433.3% change), and the Eighth Circuit’s from 19 to 62 (a 226.3% change). All other circuits have experienced comparable growth. The First Circuit increased its per judgeship pending case load from 17 at the end of Fiscal Year 1961 to 55 per judgeship (223.5% of the base period) at the close of Fiscal Year 1974, and the Second Circuit—which has experienced the smallest percentage change (136.0%) in pending cases during that period—more than doubled the case load per judgeship from 43 to 101. (*Id.* at pp. 186–187).

¹ As noted by Senator Hruska in his March 1975 statement on behalf of the Commission on Revision of the Federal Court Appellate System, the Bill would delegate to the senior of the two divisional chief judges the power (now held by the Chief Justice) to make interdivisional assignments, and would permit, *but not mandate*, a joint annual judicial conference. (Statement, p. 2). Since each division would have “its own chief judge, its own circuit executive, and its own judicial council” (*Id.*), it is not difficult to envision the early development of two circuits fully independent in spirit, in administration and in fact even while linked by a common name.

² In their submissions to the Subcommittee concerning predecessors of S. 729, several judges expressed the desire to continue in service on the “Fifth” Circuit after any split.

Clearly, the case load burden is not limited to the Fifth and Ninth Circuits. In our view, the Congress would do well to avoid the piecemeal approach represented by S. 729 and rather should focus on broader structural reorganization of the appellate system if relief is deemed necessary. The December 1973 Report of the Commission on Revision of the Federal Court Appellate System is only interim in nature; in his March 1975 statement submitted to this Committee, Senator Hruska, the Commission Chairman, stated that there is in preparation a more comprehensive report to contain the Commission's "recommendations for such additional changes as may be appropriate." (Statement, at p. 5).

We note that in numbers of cases filed, two of the adjoining circuits (the Fourth and the Eighth) are much smaller than the Fifth, with the Fourth Circuit receiving 1,462 filings in Fiscal Year 1974 and the Eighth Circuit receiving only 995 during that period. While those filings represent significant increases over 1961 and subsequent years in each instance, the combined filings of the two circuits is only 2,457, far less than the 3,294 filings in the Fifth Circuit. We do not pretend to omniscience, but a possible circuit reorganization that added Georgia to the Fourth Circuit and/or Alabama and Mississippi to the Eighth³ or a realignment that added Georgia and Florida (as seaboard states) and the Canal Zone to the Fourth Circuit and kept the rest of the Fifth Circuit as it is, might more appropriately equalize the case loads in the region than an artificial split of the current Fifth Circuit into nominal "Divisions." Indeed, the Hruska Commission itself has recommended that if the Circuit should be split, the preferred alignment would be Texas-Louisiana-Mississippi in the West with the Canal Zone and the other states in the East. (1973 Report, at p. 9). That recommendation has not been followed in S. 729.

3. Short of a broad-gauge realignment of the appellate court system, it appears to us most unfair to provide a reorganized Ninth Circuit with a joint *en banc* panel for the resolution of major circuit-wide matters, while denying the same to a bifurcated Fifth Circuit. Such a joint panel would not be a perfect solution, but it would permit the Fifth Circuit to continue in the great function it has performed as a *national* court of appeals—not merely as a regional body resolving local disputes—while still avoiding some of the burdens and inefficiencies criticized by witnesses testifying before this Subcommittee.

We have prepared, and have attached hereto, a list of most recent *en banc* actions by the Fifth Circuit. Many actions setting cases for *en banc* review were taken *sua sponte*; often the court directed that there be no oral argument. In several others, the opinions ranged from two paragraphs to two pages in length. Thus, the logistical and administrative burdens of a joint *en banc* panel technique should not in fact be large. The Lawyers' Committee sees no considerations of efficiency that serve to reduce the critical national interest in the maintenance without dilution of the federalizing function of a major judicial circuit that has played such a vital role in our constitutional history. We concur fully in Judge John Minor Wisdom's view, already presented to this Subcommittee, of the issues at stake:

"A United States Court of Appeals has a federalizing function as well as a purely appellate function of reviewing errors. We do not just settle disputes between litigants. The federal courts' destined role is to bring local policy in line with the Constitution and congressional policy. Within the framework of 'cases and controversies' and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the states and private citizens asserting federally-created or federally-protected rights. The United States Supreme Court cannot do it all. When the Supreme Court acts, inferior courts must carry out the Court's decision. It is up to us to put flesh on the bare bones of such broad mandates as the requirement that schools desegregate with 'all deliberate speed.'

³ In this possible solution, which we cite merely as an example and neither approve nor disapprove, the resulting Fifth Circuit would contain non-contiguous states. But the present Third Circuit includes the offshore Virgin Islands, and the Second Circuit—primarily based in urban New York and Connecticut—includes rural Vermont, which might more appropriately have been linked with other New England states served by the First Circuit (which itself encompasses the Commonwealth of Puerto Rico). We are not aware that these anomalies have excited particular pressures for revision.

"For the most part, the friction-making cases in the federal courts are not those involving the allocation of power between the states and the nation. They are the cases between the states and its citizens involving civil rights and fair criminal procedures. These contests arise from state courts' employing different constitutional standards in their criminal procedures from those federal courts employ, or from a state's failure to give effect to constitutionally created or federally guaranteed rights, when these rights conflict with state laws and customs. Civil rights cases reflect the customs and mores of the community as well as the legal philosophy of the individual judges called upon to adjudicate the controversies. This area of conflict therefore is the most sensitive and difficult one in which federal courts must perform their nationalizing function. This is where localism tends to create wide differences among our courts. Parochial prides and prejudices and built-in attachments to local customs must be expected to reduce the incentive of inferior federal courts to bring local policy in line with national policy.

"The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for that court to overcome the influence of local prides and prejudices.

"The best exercise of this role would call ideally for a court consisting of judges with widely disparate backgrounds who are familiar with regional and local thinking but insulated from the pressures and influences of the region and the community."

The Fifth Circuit should not be split into two separate courts heavily dominated by the regional or local interests—economic or otherwise—of one or two states.

CONCLUSION

For the above reasons, the Lawyers' Committee for Civil Rights Under Law recommends that the Congress reject the proposals in S. 729 to divide the Fifth Circuit into two nominal "Divisions," and further recommends that circuit realignment be considered only in the context of an overall appellate court reorganization plan. If Congress decides that some interim action should be taken, we believe that a better solution would follow the plan of Amendment No. 132 to S. 729, which has been introduced by Senators Cranston and Tunney. That amendment would preserve the Ninth Circuit in its present form and expand the number of authorized judges while permitting the chief judge to create a panel of not more than nine judges to sit *en banc*. We think this proposal has merit and if adopted for the Ninth Circuit should be applied to the Fifth Circuit as well. As an alternative less desirable from the Committee's point of view, a joint *en banc* panel technique should be considered.

RECENT FIFTH CIRCUIT EN BANC ACTIONS REPORTED IN THE FEDERAL REPORTER, 2ND SERIES

- Platner v. Resor*, 463 F.2d 422 (5th Cir. 1972)
Hilliard v. Beto, 465 F.2d 829 (5th Cir. 1972)
Winters v. Cook, 466 F.2d 1393 (5th Cir. 1972)
Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. 1972)
United States v. Bailey, 468 F.2d 652 (5th Cir. 1972)
Purett v. Texas, 470 F.2d 1182 (5th Cir. 1973)
Perkins v. Mississippi, 470 F.2d 1371 (5th Cir. 1972)
United States v. Robinson, 472 F.2d 973 (5th Cir. 1973)
Kessler v. EEOC, 472 F.2d 1147 (5th Cir. 1973)
United States v. Colbert, 474 F.2d 174 (5th Cir. 1973)
Baker v. Beto, 476 F.2d 1281 (5th Cir. 1973)
Gallegos v. United States, 476 F.2d 1281 (5th Cir. 1973)
Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir. 1973)
Johnson v. Penrod Co., 478 F.2d 1208 (5th Cir. 1973)
Fitzgerald v. Beto, 479 F.2d 420 (5th Cir. 1973)
United States v. Groner, 479 F.2d 577 (5th Cir. 1973)
Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973)
Bryan v. United States, 481 F.2d 272 (5th Cir. 1973)
United States v. Soriano, 482 F.2d 469 (5th Cir. 1973)
Willingham v. Macon Telegraph, 482 F.2d 535 (5th Cir. 1973)
United States v. Caraway, 483 F.2d 215 (5th Cir. 1973)

Mobil Oil Corporation v. Oil Chemical Union, 483 F.2d 603 (5th Cir. 1973)
Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973)
United States v. Mississippi, 484 F.2d 956 (5th Cir. 1973)
United States v. Sepe, 486 F.2d 1044 (5th Cir. 1973)
United States v. Castellana 488 F.2d 65 (5th Cir. 1974)
Toney v. White, 488 F.2d 310 (5th Cir. 1973)
United States v. Farias, 488 F.2d 852 (5th Cir. 1974)
Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973)
Van Blaricom v. Forscht, 489 F.2d 1034 (5th Cir. 1974)
Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974)
United States v. Dinitz, 492 F.2d 53 (5th Cir. 1974)
Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974)
Park v. Huff, 492 F.2d 1088 (5th Cir. 1974)
Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974)



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